United States Court of Appeals
for the Second Circuit

APPENDIX

ORIGINAL

77-1442

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p/s

United States Court of Appeals For the Second Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIAM F. HASENSTAB,
Appellant.

Appeal of Hasenstab from the Judgment of Sentence of the United States District Court for the Southern District of New York, at Criminal No. 77-509.

APPELLANT'S APPENDIX

(Vol. II – Pgs. 375-735)

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UNITED STATES OF AMERICA

vs. 77 Cr. 509

WILLIAM E. HASENSTAB

New York, New York
August 25, 1977 - 9:30 a.m.

- - -

(In open court - jury present.)

THE COURT: Mr. Kingham, you may proceed.

MR. KINGHAM: Thank you, your Honor.

Mr. Barney was on the stand and we will have him resume the witness stand, if we may, as a witness.

THE COURT: Yes.

MR. FRIEDMAN: If your Honor please, while we are waiting for Mr. Barney, may I make a comment on the record so the record may be clear?

Tapes have been marked into evidence without any objection by the defendant. May the record be quite clear that the absence of objection is based upon our raising no objection in terms of the authenticity or the continuity of this tape.

I understand these are copies which have been admitted, and we have no objection to these copies going into the record, and this has nothing to do with any pretrial motions which were brought before your Honor.

THE COURT: Very well.

MR. KINGHAM: No objection.

GEORGE J. BARNEY, resumed.

THE COURT: Mr. Barney, you will be continuing your testimony today under the oath which was administered when you first took the stand yesterday. Do you understand that?

THE WITNESS: Yes, your Honor.

THE COURT: Very well.

MR. KINGHAM: If I may, your Honor, this is the time in Mr. Barney's testimony where it would be appropriate to play for the Court and the jury Government's Exhibit 10 and Government's Exhibit 11, and with the Court's permission, I would like to instruct the jury about the use of the head sets, so that they will understand how to do it.

Ladies and gentlemen, you are sitting inside some wires which you noticed you crossed every day as you came into the courtroom. The head sets that you each have are wireless head sets. There are no wires attached to the head sets.

Everyone, including counsel, who are seated inside the circle of this wire, can hear through these head sets, and I have asked Special Agent Brady of the FBI to help us to play these tapes so that you will be able to hear through these head sets.

If you turn them upside down and look on one side, you will see a white knob with a black dot on the bottom. If the black dot is facing you, and you should see the black dot, that means that the head set is off.

If you just turn that knob and it clicks, the head set goes on.

When we are finished playing the tapes, if you would turn them off, we would appreciate it because they work obviously on batteries and the batteries would run down.

In order to listen, you can either put the head set over your head like this, which doesn't work for me, or you can put it under your chin like this, which sometimes is better, and just hold them.

Once you have turned the head set on, you can adjust the volume with the little white knob. So we will have it at the same volume and you can adjust it to help yourselves hear or not.

Your Honor, we have agreed with defense counsel that in playing the tapes we will not play the entire tape because not all of the tape is relevant to the issues in question; and we will begin at a certain portion. We will give the jury and the Court time to get used to the voices at the beginning and with the Court's permission I will hand out the transcripts to the jury. They are copies of Government's Exhibit 10A for identification.

THE COURT: Very well. Let me explain to the jury the use that they should make of the transcript.

Ladies and gentlemen, the evidence in the case is what you will hear with your ears. The transcripts which have been marked for identification are not evidence in the case, but are given to you to assist you in following what you hear. I want to stress that.

If you hear something that to you appears slightly different than what you have before you in the transcript, it's what you hear which is the evidence, and it is what you hear which you will consider in connection with this case.

MR. KINGHAM: Your Honor, I would ask that if the jury can turn the head sets on all the way, and Special Agent Brady will adjust the volume from here. If you have any difficulty hearing once the tape begins, just raise your hand and we will stop, and I think that would be a good procedure if that is agreeable to the Court.

THE COURT: Yes, it is.

MR. KINGHAM: I believe there is a question from a juror, your Honor, about the head set.

ALTERNATE JUROR NO. 2: We didn't get any transcripts.

THE COURT: Yes, there are two more transcripts that are due. Be sure that they get them.

MR. KINGHAM: I'm sorry.

THE COURT: First, everyone now has a transcript.

Second, I note that everyone now has a head set.

Third, I would ask you to turn the head sets to an "On" position by turning the button until you hear the click and then continuing until the button stops moving.

Has everyone done that?

All right. I find it convenient to put it over my head, but you may find it otherwise, particularly the ladies who have sort of a bouffant hairdo. Some of us don't have that much hair on the top of our heads and so we will function this way.

MR. KINGHAM: We would also ask your Honor if the jury would turn to page 32 in the transcript.

THE COURT: 32, all right. That page starts out "W.H.", which I assume, counsel, are the initials of Mr. Hasenstab.

MR. KINGHAM: Yes, your Honor.

Perhaps we should explain the keys in the beginning.

THE COURT: I would suggest you do.

MR. KINGHAM: The initials "W.H." are of the defendant, Mr. Hasenstab. The initials "G.B." are the witness, Mr. Barney, and where you see "(IA)" in parentheses, it means inaudible. That means that in preparing the transcript the witness was unable to make out what was said.

THE COURT: Finally, just to put everything in context, what you will be hearing is Government's Exhibit 10, which is a copy of the tape of a conversation which took place on December 1, 1976 according to Mr. Barney, between himself and Mr. Hasenstab at the Hamilton House in Brooklyn, New York.

Is everybody turned to page 32?

You may proceed.

MR. KINGHAM: Thank you, your Honor.

(Tape played.)

THE COURT: Can you bring the volume down a little bit? I noticed a number of the jurors expressed pain in their faces as did I with the onrush of sound. If you could just drop the volume a little bit--I know Juror No. 3, you were the one who said you had some difficulty in hearing during the voir dire. If you have any difficulty in hearing, just let us know by putting your hand up and I will be watching.

(Tape played.)

THE COURT: Ladies and gentlemen, would you turn off your head sets. There will be a short break while the operator proceeds to the next order of business.

I suggest that the jurors take their transcripts and pass them to the end of the row, and then they can be picked up.

MR. KINGHAM: Your Honor, may I put a question to Mr. Barney while Agent Brady is setting up the tape?

THE COURT: Yes.

MR. KINGHAM: Thank you, your Honor.

DIRECT EXAMINATION CONTINUED

BY MR. KINGHAM:

Q Mr. Barney, in the portion of the conversation where Special Agent Lynch's voice appears, where was that? Where did that take place?

A In the men's room.

Q At the Hamilton House, sir?

A Yes.

Q And after you left the men's room, where did you go?

A To Mr. Hasenstab's car.

Q Is that where the end of the conversation took place?

A Yes.

(Pause.)

MR. KINGHAM: Your Honor, if I may, I will distribute the transcripts for Government's Exhibit 11, which is the conversation on January 6, 1977.

THE COURT: You may.

MR. KINGHAM: I would ask, your Honor, that everyone turn to page 24. The page numbers on this transcript are in the upper lefthand corner, so you have to look in the corner for page 24.

THE COURT: That page begins:

"G.B.: Yeah, thank you."

When you all have that page, it will be page 24.

The same admonition will apply, ladies and gentlemen. The evidence is what you hear with your ears. The transcript is furnished to assist you. You probably noticed as Idid, there were some very slight differences between what we heard and what we read, and I suggest to you that it's what you heard that will govern.

MR. KINGHAM: And your Honor will begin at the bottom of the page where it says:

"W.H.: If a guy graduates law school."

THE COURT: Very well.

MR. KINGHAM: I call everyone's attention to that.

THE COURT: Very well. Let's first make sure those buttons have been clicked on and the little white wheel has been turned up to its fullness.

MR. KINGHAM: May I proceed, your Honor?

THE COURT: You may proceed.

(Tape played.)

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THE COURT: Ladies and gentlemen, if you would take off your head sets and put them into an off position so that you can see the black button and pass your transcripts to the end of the aisle, Mr. Kingham will collect them and then we will proceed.

Q Mr. Barney, the portion of the conversation that we just listened to on tape, where did that take place?

A At the Hamilton House meeting. The latter part was in his car.

Q Had you been in the Hamilton House before you got into Mr. Hasenstab's car?

A Yes.

Q The reference on the tape to the name Furey.

Are you familiar with the name Furey?

A Yes.

Q Who or what is Furey?

A He was a man in charge of a certain section at Rockleigh and I was working with him with Mr. Hasenstab's permission on some forms.

Q And do you recall a reference on the tape or during the conversation to a man named D'Angelo?

A The same situation.

Q Who was Mr. D'Angelo?

A A gentleman out at Rockleigh and I was also working on some forms with Mr. Hasenstab's permission.

MR. KINGHAM: I have no further questions.

THE COURT: You may inquire, Mr. Friedman.

CROSS-EXAMINATION

BY MR. FRIEDMAN:

Q Good morning, Mr. Barney. I am Mr. Friedman, the attorney representing Mr. Hasenstab.

Before today we haven't met, have we?

A Not to my knowledge.

Q Now Mr. Barney, I would like to ask you some questions, if I may, concerning your testimony as it relates to your arrest.

When did your arrest take place?

A I believe it was November 1, 1976.

Q And thereafter there came a time when you made a determination, I assume, to try to help yourself out of your predicament, is that right?

A Partially.

Q And you made a determination after you had spoken to federal agents or federal attorneys concerning your knowledge of people who had accepted money from you in the course of the conduct of your business, is that right?

A Yes.

Q And of course at that time your wife, as the tape indicates, was ill.

A Yes.

Q She needed care.

A She had for many years.

Q And you didn't want to go to jail; isn't that right?

A Whether she was sick or not I wouldn't want to go to jail.

Q Understandably so.

And so you have tried in the course of these months to help yourself to stay out of jail, isn't that right?

A Naturally.

Q And there came a time in December of 1976 where you agreed, at the request of certain FBI agents, to wear a tape upon your body.

A Correct.

Q And they put the tape on you and before you went out to have your meeting with Mr. Hasenstab, is it fair to say you discussed with those agents or perhaps one or more United States Attorneys what the nature of the conversation that you were going to have with Mr. Hasenstab should contain?

A General outline.

Q And you knew, of course, that when you went out there to make this tape on behalf of the government, that you were specifically at that time trying to get Mr. Hasenstab to admit that he had indeed accepted money from you in the past, isn't that right?

A Yes.

Q That was one of the specific purposes of your having that conversation which was being recorded, isn't that right?

A I can't remember if I was specifically asked to do that, no.

Q But that was one of the specific purposes, wasn't it?

MR. KINGHAM: Objection, your Honor. Asked and answered and I think the answer is sufficient.

THE COURT: Sustained.

Q Weren't you told to speak to Mr. Hasenstab about your past relationship and to establish on the tape an admission by him that he in fact had received moneys from you?

A If you are asking me if I specifically can remember if I was told that, I can't remember that I was specifically told that.

Q In any event, you asked questions relating to your past payments and got Mr. Hasenstab into conversation about those moneys, isn't that right?

MR. KINGHAM: Objection, your Honor. The conversation recorded speaks for itself.

THE COURT: I will allow it.

Q Would you answer the question.

A Yes.

Q And you were, then, still trying to help yourself, right?

A Naturally.

Q Sure. Now, the same is true as to the money.

Didn't you have a discussion with government representatives concerning an attempt that should be made by you to pay Mr. Hasenstab money?

A What meeting are you talking about?

Q Pardon me, sir?

A What meeting are you talking about?

Q When you were preparing to go out in December with the tape, did not part of your preparation for that meeting with Mr. Hasenstab include an arrangement between you and the federal agents whereby you were going to try to give Mr. Hasenstab the money?

A I wasn't going to try. I was just going to give it to him.

Q But you had a discussion with him about giving the money to him?

A Yes.

Q Isn't that right?

A Yes.

Q And as a matter of fact, that is the reason why FBI Agent Lynch entered the bathroom, so that it would perhaps be possible for him to witness that money was passing, isn't that so?

A Yes.

Q It was all part of a prearranged scheme or plan that you and the agents had in reference to this particular date?

A It was all part of my cooperation.

Q On that particular day, December 1, 1976, had you had a discussion with the agents concerning bringing into the conversation between you and Mr. Hasenstab the poor condition of your wife's health?

A No.

Q No?

A No.

Q In any event, referring to page 37 of the transcript which we have used as an aid in listening to this tape and the top of page 38, and to that portion of the tape which the transcript refers to, am I not correct, sir, in stating that it was you who initiated the action of going into the bathroom and giving Mr. Hasenstab the money by saying "All right, you want to go in the back; let's go in the bathroom"?

A It was our customary occurrence.

Q I didn't hear your last word.

A That's the way we customarily did it.

Q But it was you who initiated that and suggested [illegible] Mr. Hasenstab that you people go back into the bathroom, so that you could give him the money?

A At that meetin.

Q And that was the customary practice at your meetings where you would say at some time to Mr. Hasenstab, "Let's go in the bathroom and I will give you some money"?

A No.

Q When you went with him in the bathroom on this particular day, that was in an effort, as I think you have indicated, to ensnare him or entrap him into taking this money so that it would become evidentiary in the investigation in which you were participating, isn't that true?

MR. KINGHAM: I object, your Honor, and I ask that the jury be instructed to disregard that speech.

THE COURT: The objection is sustained.

Ladies and gentlemen, questions to which objections are sustained are not evidence. You ladies and gentlemen should consider only the evidence in the case.

You may proceed, counsel.

Q You did that, sir, as an effort to gather evidence for the FBI in connection with your participation in this investigation, isn't that true?

A Yes.

Q At the time that you spoke to Mr. Hasenstab in the bathroom on December 1st, or in the men's room in that restaurant, and I refer to that portion of the tape that stated in substance "Yeah, yeah, I know, I appreciate that. Oh, I got one, Jesus Christ. Nick, Nick called. It's a ten-inch form, 40 cartons. Remember the one-part form we did, ten inches?"

Mr. Hasenstab answered "No"; isn't that correct?

A I don't remember if that was in the bathroom or not.

Q But do you remember his indicating to you that he didn't remember a particular contract which you apparently had received by the order of Nick; is that right?

A No. That's not right.

MR. KINGHAM: Your Honor, may we approach the side bar for a moment?

THE COURT: Yes.

(At the side bar)

MR. KINGHAM: Your Honor, several witnesses have just entered the courtroom who I understand have been subpoenaed as defense witnesses. They are employees of Pan American and I request that they be excluded.

I think perhaps Mr. Friedman's associate is doing that now but I would request that they not be in the courtroom during Mr. Barney's testimony.

MR. FRIEDMAN: I consent to that and Mr. Di Piazza has advised me he saw the people come in --

THE COURT: I would note for the record they are now leaving the courtroom. I presume they are going to the witness room.

MR. KINGHAM: Thank you, your Honor.

(In the presence of the jury)

BY MR. FRIEDMAN:

Q Am I correct in stating, sir, that in the course of that conversation a portion of it referred to a contract which you had received through the efforts of Nick and that Mr. Hasenstab indicated that he didn't know about that particular order?

A I think you are confusing my answer with my first statement about that particular order.

Do you want me to clarify it if I can or not?

Q Well, the Nick -- to clarify it, let me ask you a question, Mr. Barney.

The Nick who you referred to in the conversation, was that Nick one of the purchasers or buyers at Pan Am?

A Yes.

Q And what was his last name?

A Di Napoli.

Q And had you in fact received an order for 50 carton from Di Napoli at some time prior to this meeting with Mr. Hasenstab?

A No. There is where your confusion is. I didn't get the order from Nick. Previous order which I had referred to I had gotten from Hasenstab.

Q But you told Mr. Hasenstab that it was Nick who had called you.

A Nick wanted to reorder a specific form and it previously had been placed by Mr. Hasenstab and that's why I was referring to if he remembered the order and he said no, he didn't.

Q In fact, did Nick reorder some previous order?

A I didn't accept the order.

Q Had he ordered it and then you rejected it?

A He tried to order it.

Q And you didn't accept it?

A I discussed it -- if you read on you will see-- with --

Q You didn't accept the order?

A After my discussion with Mr. Hasenstab, I received the order.

Q You had a discussion with Mr. Hasenstab about that order by reason of which discussion you then didn't accept that order?

A Correct.

Q And you had that discussion on that day, December 1st?

A That's the way I remember it.

Q It is? Do you remember, sir, in your conversation stating in reference to that order that "Bill, I had taken it at Moore's price the last time and it was a terrible price for me" and Mr. Hasenstab replying "What are you talking about? Which one?"

A What's the question?

Q Do you remember such as part of your conversation?

A Yes.

Q And I refer to the tape which you just listened to while the jury listened to it.

A Yes, I remember that.

Q And do you remember telling Mr. Hasenstab "the ten-inch form that Nick called me on" and Mr. Hasenstab saying, "Do you know, well, I don't know which one it is"?

A Yes.

Q And your saying to him, "I will give you the number later, I will call you later; all right"?

A Yes.

Q And you were complaining at that time that at least the price on that contract was not a price that represented, in your judgment, a fair price for whatever reason you felt appropriate, is that correct?

A It wasn't what I would call a contract. It was just a purchase order.

Q Pardon me?

A It wasn't what I call a contract. It was a purchase order.

Q It was an order that had been placed and you didn't want to provide the goods at the price set forth?

A Correct. That's the excuse I used.

MR. FRIEDMAN: I move to strike the latter remark out as unresponsive.

THE COURT: Strike it.

Q And at the time that your discussion contained the language with reference to a particular crew time report which was a formula you were apparently printing --

A I had printed them.

Q When you asked Mr. Hasenstab to walk it through for you this time, you were asking him to see that your company was paid promptly; isn't that true?

A No.

Q That is work that -- withdrawn.

That was an order which you had received prior to the date of this conversation in the men's room; isn't that so?

A The verbal approval on the order, yes, but I hadn't received physically the purchase order, and that's what I was trying to get Hasenstab to do for me.

Q You wanted the paper work to be expedited so that you could have that order as a firm commitment on paper; is that right?

A He was late in doing it. He was chronically late in issuing all purchase orders and I was prodding him for it. That's all.

Q You were prodding him to get the order in, right?

A To give me the purchase order.

Q Yes. Now, when you were finished with this conversation, there came a time when you met with FBI agents, isn't that right?

A Yes.

Q And you went over with them what had occurred, and what the conversation was; isn't that so?

A They debriefed me, yes.

Q And there came a time when you listened to the tape together with the agents; didn't there?

A I don't know whether the agent was there, no.

Q Did there come a time after you met with Mr. Hasenstab on December 1st and before the date of January 6, 1977, when you listened to that tape?

A No.

Q Did you mark the tape for identification in the presence of somebody?

A Yes.

Q Who was that?

A Mr. Kingham and I believe the agent when I was marking it was present.

Q That is Mr. Kingham, you mean?

A Yes.

Q The prosecutor?

A Yes.

Q And at some time before January 6th, did an occasion arise when you met either with the United States Attorney or one of them or federal agents, when you discussed having an additional meeting with Mr. Hasenstab?

A Who did you add to the attorneys? And who else?

Q I will rephrase the question.

A Please.

Q After December 1, 1976, but before January 6, 1977, did you meet with any federal agents or United States Attorneys concerning the subject of having another meeting with Mr.Hasenstab?

A Yes.

Q And am I correct in stating that your discussion with them had to do with the type of conversation which you were going to try to have with Mr. Hasenstab at your next meeting?

A Yes.

Q And you discussed with them the fact you would be wearing a tape upon your body in order to record the conversation as you were doing this work for the government; is that right?

A Yes.

Q In your conversation of January 6, 1977, when you talked about Mr. D'Angelo and that particular contract, Mr. Hasenstab was telling you in substance that you had to keep your prices down; isn't that true?

A Yes.

Q By the way, this contract that you were discussing on that date was a contract which was going to be the subject of bidding; isn't that right?

A No.

Q Well Mr. Hasenstab told you that prices had to be taken in or be obtained from Moore Business Forms; isn't that right?

A No.

Q You discussed the new contract with him on that occasion?

A That's the stock paper contract. You're confusing purchase orders with the stock paper contract.

Q Say again, sir?

A You are calling regular purchase orders contracts. There were two items, regular purchase orders, and the stock paper contract which was a contract issued once a year.

Q All right. Let's talk about the purchase order. I think it is the purchase order in reference to the D'Angelo incident.

A Right.

Q Am I correct in stating that Mr. Hasenstab, as you have indicated, was trying to get you to keep your prices down in reference to that transaction?

A Yes.

Q And then you discussed the coming contract for 1977; that would be the stock paper contract?

A Yes.

Q And in that particular portion of your conversation, Mr. Hasenstab indicated to you that prices would have to be obtained from competitors; is that true?

THE COURT: Quotes.

Q Quotes from competitors.

A Yes.

Q And you asked him to give you in advance the prices that were going to be quoted by Moore, one of your competitors, and he refused; isn't that right?

A No.

Q Didn't he tell you then he wouldn't even give his brother the prices?

A In writing. I was trying to get the prices in writing.

Q Did he give you any prices on that day for Moore's bid?

A He didn't have them.

Q You say you were trying to get them in writing?

A Yes.

Q Did someone tell you to try and get the prices in writing?

A That was the purpose of the meeting.

Q The purpose of the meeting by reason of the arrangement between you and the federal agents or attorneys?

A Yes.

Q And Mr. Hasenstab said to you, did he not, "Their prices are, you know, whatever they are, and I assume you know you got to beat Moore."

Isn't that what he told you?

A Yes.

Q He told you you had to beat Moore; isn't that right?

A Yes.

MR. KINGHAM: Objection, your Honor. Asked and answered.

THE COURT: Well, it's been answered again. I am going to let it stand.

Q And Mr. Hasenstab told you that he was waiting for four sets of prices; isn't that right?

A Yes.

Q Now, this effort by you to help yourself which included wearing the tapes, had to do with your effort which I think it would be fair to say you are still making, in order to convince -- your effort that you are making in order to convice Judge Owen not to send you to jail; isn't that right?

A Yes.

Q And understandably so.

You have met from time to time with Mr. Wynn, the United States Attorney; is that right?

A Yes.

Q And you have met with Mr. Kingham; is that right?

A Yes.

Q And you have met with different FBI agents; is that right?

A Yes.

Q And you testified against a Mr. Corey in the so-called Hartz Mountain case; isn't that true?

A Correct.

Q And you have testified on your direct examination that no promises have been made to you in respect to what your sentence would be if you cooperated; isn't that so?

A Correct.

Q But that whatever you do would be called to the attention of the judge before whom you are to be sentenced; isn't that so?

A Correct.

Q And so you have made a deal with the U.S. Attorney to cooperate in return for his promise to let the Judge know what you have done; is that right?

A Well,yes.

Q And you have cooperated and are now testifying in the way that you are because you truly expect that Judge Owen is going to give you consideration when he imposes sentence upon you in connection with your guilty pleas; isn't that right?

A I have no idea what he will do.

Q I say, you are testifying this way in the expectation that Judge Owen will take that into consideration when he imposes sentence upon you; isn't that true?

A Yes.

Q You expect Judge Owen, in simple language, to give you a break by reason of your cooperation, and that's the reason why you are cooperating; isn't that true?

A I don't know what the Judge will do. You are telling me I expect him to do something. I have no idea what he will do.

Q But you do in your mind expect him to do something for you, don't you?

A You're telling me I expect him to make a certain - no, I have no idea what he will do. If you're saying do I hope, yes, I hope.

Q All right, I will change the word "expect." You hope that by reason of what you are doing Judge Owen is going to give you a break; isn't that right?

A Of course I hope so.

Q That's why you are doing what you are doing; isn't that right?

A Partially, as I told you.

Q It isn't out of any sense of righteousness but out of an effort to help yourself and your wife; isn't that true?

A No, you're wrong.

Q You are doing it out of a sense of righteousness?

A I discussed it with my family when this happened, and they asked me to tell the truth, and that's part of my motivation.

Q Is that the more significant part of your motivation for testifying here, because your family asked you to tell the truth?

A I can't tell you what I would have done if they had said don't cooperate. I can't tell you but I know it fitted in with my feelings on it.

Q As a matter of fact, you made your deal with the government to help within one week from the date that you were arrested in 1976; isn't that so?

A The day after I discussed it with my family, less than a week.

Q Less than a week?

A Right.

Q And it was within that period of time that you had discussed the question of cooperation in terms of ultimately having your cooperation called to the attention of whatever judge should be assigned in this case to sentence you after you took a plea; is that right?

A You lost me on the question. If you mean did I discuss that with my wife, I didn't.

Q No, I didn't mention your wife, sir.

A Well, I don't know how to answer your question.

Q I will reframe it, sir.

Is it true that you agreed to cooperate within a period of a week or less after your arrest after having made a deal with the government whereby you knew that the government would tell the judge, who ultimately would sentence you, of your cooperation?

A No.

Q No one told you that within that period of a week?

A Well, if you -- I decided to cooperate. I then went with my attorney to Mr. Wynn's office; and at that point after I decided to cooperate, I was told what the government was going to exact from me.

Q And that was approximately within a week or less after the date that you were arrested?

A Correct.

Q Now, you have told this jury that in response to Mr. Kingham's question, you know that in reference to each of the two counts to which you have entered a guilty plea there is a five-year sentence, isn't that true?

A I thought I said ten years, but five years I guess, that's correct.

Q And you don't expect -- withdrawn --

It is your hope that in return for your cooperation the Judge is not going to sentence you to five years on each count; isn't that true?

A Correct.

Q And as a matter of fact, would it be fair to say that it is your hope that the Judge will walk you out of the courthouse on some type of a non-custodial sentence?

A You mean I won't go to jail? Sure I hope that.

Q That's all.

And you don't expect the Judge, Judge Owen, to turn a deaf ear to the U.S. Attorney's remarks about the extent of your cooperation, do you?

A No.

Q You are quite sure that the Judge is going to listen to the United States Attorney, right?

A Well, he told me he had read the reports.

Q And that he would listen to the United States Attorney's comments with reference to your cooperation?

A I don't know what the procedure is.

Q During the period of time, sir, that you have been working along with the government in connection with this assistance you have been giving the government, by testifying or otherwise, when you were in conversation with government agents, from time to time did they write down what you were saying?

A No, they must have been recording it.

Q You didn't see anybody write it down?

A I don't remember.

Q Your present business employment, I think you have indicated, is as a salesman?

A Correct.

Q And what is the name of that company?

A Corporate Forms.

Q Do you have any proprietary interest in Corporate Forms?

A No.

Q Your business, Tabulating Forms, was that corporation dissolved by you before you took this job as a salesman?

A No, it's still in existence.

Q You had indicated, I think, that you were a major stockholder in that company?

A Correct.

Q And did you sell your shares of stock to somebody?

A No.

Q Do you still retain your shares of stock in that company?

A Yes.

Q What percentage of stock do you own in that company?

A 72 percent.

Q Who owns the other stock in that company?

A Stockholders.

Q Members of the public?

A Correct.

Q How about members of your family?

A I think my mother-in-law has a small portion.

Q And was it -- do you know what the volume of business was of that company in 1976?

THE COURT: Approximately.

A About 1 million 5, I guess.

Q And do you know what the approximate business to date of the company is?

A For this year?

Q Yes.

A Perhaps 100,000.

Q Are you an officer or a director of that company?

A Yes.

Q What is your position with Tabulating Forms?

A President.

Q So you remain as president of that company while you are employed as a salesman for another company?

A Correct.

Q Do the companies sell the same type of forms?

A Tabulating Forms isn't operating.

THE COURT: You said it was then dissolved. Would it be fair to say it is inactive?

THE WITNESS: Yes.

THE COURT: In other words, you haven't made a sale on behalf of Tabulating Forms in the last couple of months?

THE WITNESS: Correct.

THE COURT: Very well.

Q But up until the last couple of months you say it did about $100,000 of business?

A About that, as a guess, yes.

Q And that company is not doing business, am I correct, because the City of New York or some other agency condemned the building that the company was operating its business in?

A No.

Q Did the company own a warehouse or operate a warehouse in Long Island somewhere?

A We had our manufacturing facilities there originally, and when I moved it out, we kept the building as a warehouse.

Q Does that company still have it as a warehouse?

A No, we were able to sell it.

Q Tabulating Forms sold that warehouse?

A Correct.

Q When?

A April of this year.

Q And was the warehouse sold to the company that you are now salesman for?

A No.

Q To what company was it sold?

A I forget the name of it. It was three men that bought it.

Q And how much money did your company, Tabulating

Forms, receive for that warehouse?

A We had to sell it under the mortgage. It cost us $25,000 to sell it.

Q Did Tabulating Forms own some property that was condemned?

A No.

THE COURT: That building was -- I guess they condemned it. They were threatening to condemn it. That's why we had to sell it so cheaply. There was a problem with it.

Q It isn't economic distress, but rather, the action of some governmental agency that caused you to sell the building, and in this case it was that the City was going to take over the property?

A No, that's wrong.

Q Who was going to take over the property?

A No one was going to take over the property.

Q The property was condemned?

A There was a violation on the property.

Q And the City closed it down?

A No.

Q Who closed it down?

A I closed it down.

Q And was the land on which the building stands sold also?

A Yes.

Q What was the sales price?

A $64,000.

Q Did Tabulating Forms in 1977 own any other real property?

A 1977, we had an investment in a --

Q In what?

A In a company in Jersey.

Q And what was the name of that company?

A U.S. Tabulating Forms.

Q Were you a stockholder in that company?

A No.

Q What was your company's investment in that?

A $25,000.

Q Now, sir, during the course of your conduct of your business, in 1976 and 1977, did you keep some type of a diary?

A Yes.

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Q Was that called a daytimer?

A Yes.

Q And that daytimer is in the possession of the government?

A Some of them are.

Q And you live now in Greenwich, Connecticut?

A Yes.

Q What is the name of the street?

A Indian Chase Drive.

Q And you live thre with your wife?

A Yes.

Q Did you have three telephones there?

A Yes.

Q And would it be fair to characterize that as a small estate?

A No.

Q Tell me, during the course of 1976, did you undergo a tax audit?

A Yes.

Q And did there come a time when you made a civil settlement with the government in respect to taxes claimed to be owed?

A Yes.

Q You have not been indicted on any tax evasion charge, have you?

A No. We paid our taxes.

Q You paid your taxes after the audit?

A Yes.

Q And these payments that you made during the course of your business with these different companies that you have described on your direct examination, 50,000 here, 50,000 there, 12,000, had you taken those payments that you made to these diffetent people off your income tax?

A Up until 1974 I did. Off the corporate taxes you mean?

Q Well, did you take them off your personal taxes?

A I showed them -- up to 1974 they were shwon or I attempted to show them as expenses to me.

Q And after 1974, what did you do about those payments in respect to income taxes?

A I took it as regular income and paid income taxes on them.

Q And you didn't charge those expenses in '76 or '75 as an expense against the cost of doing business?

A No. I was getting audited. I had to pay back taxes. I figured it wasn't worth it and I will just take it as income.

Q And how much in back taxes did you pay?

A $23,000 the last audit.

Q And when you were being audited, sir, did you tell the auditors for the government that these sums that you had paid out in the course of your business were paid out in order to do the business that you have described?

A No.

Q You concealed that from the IRS?

A Yes.

Q In reference to the conversations that you had with federal agents, do you remember a conversation with an Agent Lynch and perhaps an agent Marshon on or about December 17, 1976?

A I don't remember a specific conversation at that time, no.

Q But you do remember conversations in and about December of 1976, don't you?

A I remember conversations, yes.

Q Before testifying here today, have you had occasion to review what purports to be typed transcripts of your conversations with agents?

A Well, I edited my transcript, yes.

Q Otherwise than editing your transcript, did you look over any typewritten documents which purported to be notes on conversations that you had with the agents?

A Yes, yes, yes.

Q In and about June of this year were you specifically called to the United States Attorney's office or to the FBI to provide information in reference to a presentation of this case to a grand jury -- that is, the Hasenstab case?

A I suppose it was -- you must know the date. I guess it was in June.

Q June or July?

A Right.

THE COURT: He says he guesses it was in June.

Q And did you discuss with agents or United States Attorneys in those meetings in June or wherever it took place details of your relationship with Mr. Hasenstab?

A Yes.

Q Did they go over with you statements which you had previously made to agents in connection with your dealings with Mr. Hasenstab?

A Yes.

Q And is it true that in and about December of 1976 you told federal agents that in reference to a Mr. Saul Welger that you gave him a 1975 Cadillac automobile?

A Correct.

Q And that Mr. Welger was an employee in the data processing section of Pan American Airlines in New Jersey?

A [illegible]orrect.

Q [illegible]d that that was the third automobile which Tab Forms had supplied to Mr. Welger?

A Correct.

Q And besides the automobiles, had you also given Mr. Welger, according to your statement to the agents, your American Express card which Welger used for about a year?

A Correct.

Q Through September of 1976.

A Correct. He might have used it beyond that but at least up until then.

Q Did you also tell the agents that in return for these things that you gave Mr. Welger, he recommended Tab Forms, Inc. to be used as a Pan American Airlines vendor?

A No. I don't remember saying that. If I did, it was wrong.

Q Well, I show you this typed transcript marked 3509, the government's exhibit, and call your attention to the bottom paragraph and ask you to read it.

THE COURT: To yourself.

Q Yes, to yourself.

(Pause)

A Well --

Q Have you read the statement?

A I have read it.

Q Does it refresh your recollection now as to whether or not when you spoke to the agents in December of 1976, that you told them that Welger recommended Tab Forms to be used as a Pan American Airlines vendor?

A I don't remember saying it but obviously I did.

Q And of course in December of 1976, that being an earlier date than today, your recollection of your relationship with Mr. Welger had to be better than it is today, isn't that true?

MR. KINGHAM: Objection to form.

THE COURT: Sustained. Argumentative.

If you wish to state that question, state it properly and it will be allowed.

Q Was your recollection in December of 1976 of your relationship with Mr. Welger better than it is today?

A My recollection is better today.

Q All right, sir.

Do you recollect telling the agents on that date that you spoke to them, which Exhibit 3509 refers to, that Welger also gave you the prices charged by Moore Business Forms, Incorporated to Pan American Airlines on a major stock Tab contract in order to enable you to get this contract?

MR. KINGHAM: Your Honor, I will object to the form of this question as being asked as to prior statements.

I have no objection to the question as it relates to whether or not the fact took place but as to conversations with agents, I believe there is an improper foundation and there has been before now.

THE COURT: I think there has to be a foundation laid. I certainly would permit that to be done in the first instance.

Q From having looked at this Form 3509 and the bottom paragraph thereof, can you tell us whether or not you have any recollection of having a conversation on or about December 17, 1976, with the agents concerning Mr. Welger giving you any prices?

MR. KINGHAM: Objection.

THE COURT: Sustained.

Q Look at the bottom paragraph of this document.

MR. KINGHAM: Objection. There is no foundation for the witness to review the document.

THE COURT: That's correct. You have got to exhaust his recollection on the subject before you can show him anything.

MR. FRIEDMAN: I think he said he didn't remember, Judge. Maybe I am wrong.

MR. KINGHAM: The foundation is not here.

THE COURT: Let's see if we can get a foundation in. I don't recall that his recollection on the subject was exhausted.

You certainly can impeach him, if you wish, once you get a certain foundation.

Q Let me ask the question.

Do you have any recollection, sir, of having a conversation with Agent Marshon and Agent Lynch in and about December of '76?

A If -- I had many conversations and if you are asking me to be specific about this one, I can honestly say I don't remember that specific one.

Q Fair enough.

When you say you don't remember, are you saying you don't remember the particular date on which a particular subject matter was discussed?

A Correct.

Q But you do remember having meetings with them in December?

A Yes.

Q And did you have a number of meetings with them in December?

A Yes.

Q And they were asking you to as to your relationshi with people in connection with the business world as you were dealing with them in the paper business, isn't that right?

A Yes.

Q And in the course of the conversation that you had with these agents, did the name of Mr. Welger come up?

A Yes.

Q And do you recall, sir, having a conversation with these agents concerning Welger's recommending your company to be used as a Pan American Airlines vendor.

MR. KINGHAM: Same objection, your Honor.

THE COURT: I will overrule it.

A I don't specifically remember it but I am sure I did discuss it.

Q Do you have any recollection, sir, of telling the agents in the course of your conversation with them that Welger in return for the things that you gave him, the

Cadillac and the other cars, the credit card, that Welger would recommend Tabulating Forms to be used as a Pan American Airlines vendor?

A I don't remember stating it that way, no.

Q Do you have any recollection, sir, of telling the agents that Welger gave you the prices charged by Moore Business Forms, Incorporated to Pan American Airlines on a major stock Tab contract in order to enable you to obtain this contract?

A I remember saying that, yes.

Q Now I want you to look at 3509, sir, and ask you once again to read the bottom paragraph on the first page to yourself.

(Pause)

Q I ask you, after having you read that paragraph, does that refresh your recollection as to whether or not in your conversation with Agents Marshon and Lynch you told them that Welger was the person who would recommend Tabulating Forms to be used as the Pan American Airlines vendor?

A I don't remember saying that.

Q This was a 1975 Cadillac that Mr. Welget got?

A Yes.

Q In return for receiving that Cadillac, what did

Mr. Welger do, if anything, for your company?

A Nothing that he hadn't been doing.

Q He did nothing special?

A No.

Q For you?

A No.

THE COURT: He did nothing that he hadn't been doing.

Q What had he been doing for you?

A Using me as one of their vendors.

Q And had he selected your company as one of Pan Am's vendors?

A No.

Q When you say he was using you as one of Pan Am's vendors, what do you mean by your testimony that he was "using" you?

A The user department had the right to use three vendors. I was one of them. Welger hadn't selected me. It was prior to Welger's being there that I was selected as a vendor.

Q Did he continue to use you when he got there?

A Yes.

Q And that was an act in his discretion, to continue to use you or not to use you, is that right?

A No.

Q Well, tell me, sir, if he had no discretion to use you or not to use you, what was the specific purpose of giving him this 1975 Cadillac?

A I can't -- well, you are asking me about that car and I really can't tell you my motivation on that car.

Q He is not related to you, is he?

A No.

Q You were not seeking to get yourself some kind of a tax deduction by giving it away to a charity, were you?

A No.

BY THE COURT:

Q Was this the first thing that you gave Mr. Welger?

A No.

Q Had you given him other cars?

A Yes.

Q Previously?

A It is in the testimony.

Q How many?

A Three.

Q Including this Cadillac?

A Yes.

Q What else did you give him?

A The first car was a Mazda.

Q When was that?

BY MR. FRIEDMAN:

Q What was it -- sorry.

THE COURT: I withdraw the question.

Q When was it that you gave him the Mazda?

A I guess about two years prior to that.

Q What was the other car that you gave him?

A It was a used Cadillac convertible.

Q What year?

A '70, '71.

THE COURT: When did you give him that?

MR. FRIEDMAN: That's what I was going to ask.

THE WITNESS: I guess the year before, 1975.

BY THE COURT:

Q Am I correct that the first of the three cars you gave him was a Mazda?

A Yes, sir.

Q That was when?

A I guess 1974. As a guess.

Q That's a guess. What is your best estimate?

A 1974, your Honor.

Q Then as I understand your testimony you gave him a used Cadillac?

A Yes.

Q When did you give him that?

A The next year.

Q 1975?

A Yes.

Q Then I heard something else about a Cadillac.

Did you give him a third car or a second Cadillac?

A Yes.

Q When was that?

A '76.

Q Was that used also?

A Yes.

Q That was a '75 which you gave him in '76, is that it?

A Yes.

MR. FRIEDMAN: Is your Honor finished on this issue?

THE COURT: Yes.

BY MR. FRIEDMAN:

Q Well, tell us, what was the motivation that you had in giving Mr. Welger the Mazda?

A Well, to say thanks and as an act of friendship.

Q To say thanks for what? What had he done for which you were thankful?

A Tried to direct business towards me.

Q How did he try to direct business towards you? Do you know?

A Having me work on the forms, redesigns, recommended me to the purchasing department.

Q He would recommend your company to the purchasing department as a vendor, is that right?

A No. Again, there are only three vendors permitted in the tabulating department.

Q You have said that he has -- he recommended your company to the purchasing department.

A On specific orders but not as a vendor, general vendor. Just on specific orders.

Q Orders dealing with computer paper or other paper products, right?

A Right.

Q That's the nature of your business, paper?

A Yes.

Q And on certain orders he would recommend you to the purchasing department; is that what you are saying?

A Yes.

Q So you wanted to say thank you.

A Correct.

Q And thereafter you gave him a Cadillac convertible and was that for the same reason?

A The first -- in my mind the first car was an act of friendship on my part.

The second car, I had bought a new car and he asked me for the one that I had. He asked me for it.

Q Yes.

A And I said fine. I was surprised.

Q And you gave him the car?

A Right.

Q That was a, what year Cadillac convertible was it then?

A It was a '71, somewhere around there.

Q What was your motivation in giving him that 1971 Cadillac?

A Because he asked me. My motivation was because he asked me.

Q This was a 1971 Cadillac?

A Correct.

Q And it was given to Mr. Welger in what year?

A '75 the best I can recollect.

THE COURT: What was your car, used and you went out and bought another one?

THE WITNESS: Yes.

Q When did you buy the '75 Cadillac? Approximately.

A In June, I believe, of '75.

Q Was that a convertible?

A It wasn't for me. It was for someone that worked for me.

Q Was it for a salesman?

A Sales manager.

Q Was it a convertible?

A No.

Q And the sales manager used it for some time?

A Correct.

Q And then you gave it to Mr. Welger?

A Correct.

Q Mr. Welger, did he ask you for that Cadillac, too?

A I can't remember.

Q You would remember if he asked you for that car?

A Sir, I have gone over it and I can't remember.

Q How much was the car worth at that time, that '75 Cadillac?

A About six, seven thousand dollars.

Q And there is only one man that you know of by the name of Saul Welger, isn't there?

A Yes.

Q And only one Saul Welger who works for Pan American so far as you know?

A Correct.

Q And a '75 Cadillac, even to a man doing the of business that your company was doing, was a thing of substantial value, isn't that true?

A Yes.

Q Did anyone ask you to think about whether or not Mr. Welger asked you for that Cadillac or whether you voluntarily offered it to him?

A No.

Q Did something in particular cause you to think it over in your mind so that you would have an answer in your mind as to whether or not you gave it to him by reason of his request or just on your own initiative?

A Just that I wanted to tell the truth.

Q And when did you start to think about this third Cadillac in an effort to tell this jury the truth?

A I guess when I started, when I was going to testify

Q And you had some reason to believe that you were going to be asked about this Cadillac, isn't that right?

A Well, I was sure it would be asked.

Q And as a matter of fact, the subject of the Cadillac came up in the course of the preparation of you as a witness for this trial, isn't that true?

A No. I don't remember it.

Q Now, sir, having been asked these questions that I have put to you and having read this Government Exhibit 3509 and having testified, do you have any recollection now as to whether or not it was Mr. Welger who asked you for that Cadillac or whether in fact it was you who on your own initiative gave him the Cadillac without his request?

A I can't remember.

Q Between 1974 and 1975, had your business with Pan American increased?

A Yes.

Q Do you know by what percentage, roughly?

A I think it doubled.

Q Pardon me, sir?

A I believe it doubled.

Q Would it be fair to say that it was the user department that employed Mr. Welger that had ordered a substantial quantity of your paper products from 1974 to 1975?

A No. They didn't place the orders.

Q Was the paper that was ordered from 1974 to 1975 in large part for the user department in Rockleigh, New

Jersey, where Mr. Welger was employed?

A They were the user department, yes.

Q And that user department would send in the requisitions to Pan American's buying offices, isn't that right?

A Right.

Q And Mr. Welger was the individual who would, in the main, make up those requisitions, isn't that true?

A Yes.

Q And the paper that was ordered by Ban American through its purchasing department went out to that user department in Rockleigh, New Jersey, where Mr. Welger was employed, isn't that so?

A Yes.

Q And during that period of time from 1974 to 1975, can you give us an approximation in reference to how many requisitions Mr. Welger made a recommendation that your company be the vendor?

A Perhaps 5 percent of the time, 10 percent at the most.

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Q And this is your -- from your recollection?

A Yes.

Q Did you see the requisitions that were made or prepared from Rockleigh, New Jersey?

A Some of them, yes.

Q Just by the way, sir, do you know Mr. D'Angelo?

A Yes.

Q Do you know where he works?

A Rockleigh.

Q Is he in the Data Servicing Management Department?

A I don't know.

Q And do you know a Mr. Furey?

A Yes.

Q And did you discuss with Mr. D'Angelo on any occasion the preparation of bids or the supply of paper to Pan American?

A No.

MR. KINGHAM: I object, your Honor, that's two questions.

THE COURT: He has answered it. He said no.

MR. KINGHAM: I'm sorry, I didn't hear that.

Q Under what circumstances did you know Mr. D'Angelo.

A I was introduced to him --

Q By whom?

A By Sol Welger.

Q Sol Welger; the man from Rockleigh?

A Right.

Q And you were introduced to him when by Sol Welger, about?

A I don't know.

Q Give us a year.

A Well, it was some time in 1976. I had permission from Purchasing to go work on a new form with D'Angelo, and as well as Furey, so I think it was towards the summer or around August, September. Around there.

Q You had permission from Purchasing; is that what you said?

A I couldn't go anywhere without permission. Of course not.

Q Are you saying that you had permission from Purchasing?

A Yes.

Q Any particular individual in Purchasing?

A Mr. Hasenstab.

Q Not Mr. DiNapoli?

A No.

Q Do you remember when you had obtained permission from Mr. Hasenstab to speak to Mr. D'Angelo?

A Sure.

Q When was that?

A I was in Welger's office.

Q Well, you had been introduced to Mr. D'Angelo by Mr. Welger, is that right?

A Yes, but we got permission from Hasenstab to work on the form.

Q When you say work on the form, you mean you were having something to do with signing the form?

A Correct.

Q And what was Mr. D'Angelo's function with the company that required you to speak to him?

A He knew what the design would look like. He was coordinating it with several other areas of Pan American.

Q And he was to make up specifications for that form along with you as a prospective buyer; is that right?

A No. Not the specifications. They were already outlined. It was just the design of the form.

Q And you were to work along with him so that as a prospective supplier, you would know what the form was to loo like?

A No, I wasn't a prospective supplier. I was going to be the supplier.

Q You were what?

A I was going to be the supplier.

Q All right .

And Mr. Welger had introduced you to Mr. D'Angelo after Mr. Hasenstab had okayed that?

A Absolutely.

Q How about Mr. Furey? What was his role with the company?

A I think in reservations.

Q When did you meet Mr. Furey?

A Somewhere around the same time I met D'Angelo.

Q And who introduced you to Mr. Furey?

A Same thing, Sol Welger.

Q And are you saying that Mr. Hasenstab gave permission for you to meet Mr. Furey?

A Absolutely.

Q Under what circumstances was that permission obtained? Did you speak to Mr. Hasenstab about it?

A I remember -- I forget which -- whether it was Furey or D'Angelo but I remember a specific call from Welger's office to Mr. Hasenstab's and I insisted that it get cleared with --

Q There was a certain protocol--

THE COURT: Let him finish.

A -- with Mr. Hasenstab. I didn't want to get into trouble.

Q That is, there was a certain protocol that was observed within Pan American whereby certain people in different functions had to do their respective jobs and not go beyond their authority in the company, is that right?

MR. KINGHAM: Objection, your Honor.

THE COURT: Susatined.

Q You say you didn't want to get into trouble.

Did the discussion with Mr. Welger about speaking to Mr. D'Angelo concerning these forms take place before Mr. Welger made the phone call to Mr. Hasenstab?

A Yes.

Q It was Mr. Welger who suggested that you speak to Mr. D'Angelo about this form on which you were going to become the supplier, is that right?

A Yes.

Q And it was Mr. Welger who suggested that you speak to Mr. Furey about the form which his section of the company had to do with before you became the supplier; is that correct?

A Yes.

Q You, not wanting to offend the supervisor of the Purchasing Department, insisted that Mr. Welger get an okay, is that right?

MR. KINGHAM: Objection, your Honor.

THE COURT: Sustained.

Q You insisted upon Mr. Welger calling Mr. Hasenstab?

A Yes.

Q Is that what you say

A Yes.

Q Did you have a motive in having Mr. Welger call?

A Yes.

Q I think you said you didn't want to get in trouble; is that correct?

A Right.

Q And what trouble would you have gotten into if you had spoken to these people without having Mr. Welger get an okay from Mr. Hasenstab?

A I am remembering now, I only cleared Furey with him, and I did get in trouble with Hasenstab because I didn't clear D'Angelo's order. He got very, very angry at me.

Q And the fact that he got very, very angry at you is something that now sticks in your mind?

A No, it's mentioned in our tapes.

Q But it's now in your mind, that's why you testify the way you do, isn't that right?

A It just occurred to me, right.

Q Sure.

And it was Mr. Welger then who made the recommendation without Mr. Hasenstab's knowledge that you speak to Mr. D'Angelo?

MR. KINGHAM: Objection.

THE COURT: Sustained.

Q Did Mr. Welger call Mr. Hasenstab in your presence before you spoke to Mr. D'Angelo?

A I'm sorry, I was thinking of something else.

Q All right, sir.

Are you ready for me to put a question to you?

A Yes, go ahead.

Q Did Mr. Welger call Mr. Hasenstab in reference to your speaking to Mr. D'Angelo before you spoke to Mr. D'Angel

A I want to change my thought on what happened if I may.

Q Yes.

You want -- you have a better recollection now as to your answer

A On D'Angelo, right.

MR. FRIEDMAN: With the Court's permission, may the witness change his answer?

THE COURT: If you have no objection, the Court certainly has no objection.

Q All right, give us your changed recollection, sir.

A Both were cleared with Hasenstab and Hasenstab told me he didn't remember my clearing the job with D'Angelo' job; and he became aware of it or acknowledged the awareness of it when in conjunction with that form -- for every form you had to buy an envelope, and the envelopes were very large and very expensive, and we didn't usually get involved with envelopes, but they wanted to make it a whole package; and we went to get a price, and we went to a source that was already supplying the envelope, it was Diplomat Envelope in Long Island City; and the salesman there got on the phone, called Hasenstab, and Hasenstab got all upset and he called me and he said, like, "What's going on here?"

And I reminded him that I had had permission to discuss the form, and I said, "Bill, as a byproduct, the envelope popped up."

He said, "Well, Diplomat thinks I am giving his business away to you."

Q Hasenstab complained about your checking prices with Diplomat? Is that what you're saying?

A He complained about my getting involved into an area that he didn't want me into.

Q Now I will ask you this, sir, again just so the record is clear:

Your best recollection, did Mr. Sol Welger introduce you to D'Angelo?

A I said yes.

Q Did he introduce you to Furey?

A Yes.

Q And did he introduce you to D'Angelo before -- withdrawn.

Did he introduce you to D'Angelo without any conversation having taken place so far as you knew with Hasenstab about your speaking to D'Angelo?

A No. One of us would have cleared it with Hasenstab, I assure you.

Q You tell me that one of you would have cleared it. I want to know if you have any recollection now, in view of your testimony on the subject.

A I know that one of them, because I can remember the call, one of those things was cleared. It was either Furey or D'Angelo.

Q When you say one of those things were cleared and you remember the call, was this a call by Mr. D'Angelo or Mr. Furey to Hasenstab to clear it or was it a call by Welger to clear it, or was it a call by you to clear it?

A It was Mr. Welger to Hasenstab.

Q That's now your best recollection?

A Yes.

Q And that that call was made in reference to one of those two individuals?

A Correct.

Q And you don't know which one?

A That's right.

Q When you gave the 1975 Cadillac to Mr. Welger, was he already then in possession of your American Express credit card?

A Yes.

Q For how long a period of time had you given your American Express credit card to Mr. Welger?

A About a year.

Q And he used that card for his own personal expense is that right?

A Right.

Q And in order to use that card, he had to sign a name, is that right?

A Right.

Q And what was the name that he had to sign?

A It started off my card; he signed my name, and the it got so it was inconvenient, and I had another card issued under a salesman's name, which I switched with Welger.

Q Is it your testimony, sir, that the use of these credit cards, both of them, was only over a period of a year, or was it the card --

A I think he only had the card a year.

Q One card or both?

A Well, I got the other one. We swapped.

Q What I am trying to be certain of in your answer, sir, is the total period of time that you recollect he used cards given to him by you.

A Well, no, prior to that I would on occasion loan him a card for a specific night, but it wasn't always -- he would give it back.

Q Excepting for the one year when he had a card or cards steady, before the year period, for how long a period of time would you say it was that you had been giving Mr. Welger the occasional use of your credit card?

A Perhaps a year.

Q And you authorized him of course tosign your name to it when he used your credit card, is that right?

A Yes.

Q And you authorized him to sign the salesman's name when he used the salesman's credit card?

A Right.

Q Did you give that card to Mr. Welger out of friendship?

A Well, I tried to make it logical in my mind. I wasn't doing any entertainment with him, and I thought I could justify him using it, yes.

Q Did you give it to him out of friendship?

A I don't know. I wouldn't say so.

Q Well, would you say that your motive in giving it to him had something to do with the -- something to do with the conduct of your business?

A I would say so, yes.

Q Tell me, do you have any recollection of giving any cash to Mr. Welger?

A No.

Q Do you have any recollection of giving him anything else besides these three cards, the two credit cards and the occasional use of your credit card before that?

A I think he bought something for his house, television set. I can't remember.

Q And when you say you think he bought something lik a television set, there is something specific that stands out in your mind that calls that to your recollectin; isn't that right?

A I think he got a television set, yes.

Q And do you know who paid for that television set?

A We did.

Q How did "we" pay for it?

A I guess I gave a check to whoever he bought it from.

Q Do you remember how much it was?

A No.

Q Do you remember if it was -- the amount was in hundreds?

A I would guess around $400.

Q Do you remember anything else that you may have given him of value?

A I think he had his brakes repaired once.

Q Anything else besides the brakes? Brakes of a car, right?

A Yes. No, I can't remember anything.

Q You have no recollection of anything else?

A No.

Q Mr. Welger did in fact recommend you as a vendor to the Purchasing Department?

A No.

MR. KINGHAM: Asked and answered, your Honor.

THE COURT: It's answered again. He said "No."

Q Mr. Welger, did he set the prices that your company was paid for the goods that you sold to Pan American?

A On a rare occasion .

Q How would he set those prices?

A He'd ask me what a job was going to cost and we would negotiate.

Q And you would agree upon a price?

A Occasionally.

Q And then it was Mr. Welger who would send the price to the Purchasing Department?

A On those occasions, yes.

Q Do you remember on how many occasions it was that Mr. Welger chose the price?

A Well, a few times. I don't know how many.

It was the function of Purchasing to get the prices; and there were exceptions.

Q But do you have any recollection of the number of times that Mr. Welger did that?

A Maybe in the time I knew the man, maybe a dozen times.

Q You are familiar with the expression, of course, blanket purchase order?

A Yes.

Q Did you discu[illegible] Mr. Welger the attempt by you to get that blanket purchase order for your company?

A Well, it really wasn't necessary to discuss it with him.

Q Did you discuss it with him whether it was necessary or not?

A I guess I did.

Q Did you discuss with Mr. Welger the price or prices that you might possibly submit on that blanket purchase order?

A He let me have the prices that he was paying, yes.

Q He let you have the prices that he was paying for like goods to what supplier?

A To what supplier?

Q Yes, what prices, whose prices did he let you get?

A Moore, Moore Business Forms.

Q Moore was your competitor?

A Well, no, they had the contract. I was --

Q You were their competitor?

A Right.

Q And he gave you the prices that Moore was charging the company so that you would have knowledge of that when you submitted a price on like goods; is that right?

A Correct.

THE COURT: When did he do that?

THE WITNESS: About April, April or May of 1975.

Q And that information was given to you in the preparation by you of your documents for a bid on that contract; is that right?

A No.

Q Didn't you get those prices so that you could use them in formulating the price that you would charge?

A No.

Q What was the purpose of Mr. Welger giving you the prices of Moore, the supplier of those goods?

A I didn't need the prices from him.

Q If you didn't need those prices from him, sir, under what circumstances did your conversation with him occur whereby he gave you those prices?

A I asked him, I had to lay the ground work with him, if he had any objection to my supplying some of the stoc paper.

Q In 1975, as of that time when you asked him that, had you already given him this second automobile, this Caddie convertible?

A I don't remember.

Q He was already using your credit cards?

A Occasionally, yes.

Q When you asked him if he had any objection to your supplying those forms that Moore was supplying, he told you no?

A Correct.

Q And did you ask him, sir, what Moore's prices were?

A I believe he volunteered that information.

Q Do you have any specific recollection?

A No, but I know I didn't have to know anything from him.

Q What was the relevance then if he volunteered that price information, what was the relevance of you getting this price information that you didn't need?

A Well, I knew I would get it from Hasenstab. In fact, Hasenstab, when I discussed it with him, said, "I'll give you the prices;" and I said, "Sol already did that."

MR. FRIEDMAN: I move to strike that answer as unresponsive. The question was "What was the relevance of Welger giving him the prices."

THE COURT: And you opened the door to that, counsel. When you asked the question what was the relevance, you permitted him to do that.

No, the answer will stand.

MR. FRIEDMAN: All right.

Q Welger gave you Moore's prices before you got prices from Hasenstab?

A Yes.

Q When Moore's prices were given to you, what was the purpose of your getting them?

A From whom?

Q From anybody? How did you use them?

MR. KINGHAM: Objection, your Honor.

I will withdraw the objection.

A I used them to -- as Mr. Hasenstab told me, I just had to go a little bit under the prices.

Q You used them in order to get your bid into Pan American, isn't that right?

A Correct.

Q And I asked you before whether or not you had used them in making your bid; isn't that true?

A See, yes, but I was --

Q And in fact --

THE COURT: Wait.

MR, KINGHAM: Your Honor, I believe the witness hadn't finished.

THE COURT: "Yes, but I was" what?

MR. FRIEDMAN: I object to "but" as being not responsive to the question.

THE COURT: Let me hear the question, Mr. Reporter, and the answer given up to the point of interruption.

(Record read.)

THE COURT: No, I will strike everything after "Yes."

Q In fact, sir, did you receive a blanket purchase order in 1975 from Pan American?

A I don't know how it was worded, but I got a purchase order from them, yes.

Q Was it a blanket purchase order?

A I would say so, yes.

Q Was that the stock tab contract that we have been talking about or something different?

A Well, it's the timing of it. See, the contract was issued at the beginning of every year, and that was the stock tab contract.

Q And is this the contract that was the subject of a blanket purchase order?

A Well, I had poached on Moore's purchase order in the middle of the year, and they let me. They issued another purchase order or another contract to me to be an alternate supplier of the paper for the balance of the year.

Q When you say "alternate supplier for the balance of the year," that's 1975; are you saying that you became a supplier in addition to Moore?

A Yes.

Q And was that a blanket purchase order for a stock tab product?

A Yes.

Q And --

THE COURT: Was that the first blanket purchase order that you had received from Pan Am?

THE WITNESS: No.

THE COURT: Just answer yes or no.

THE WITNESS: No.

THE COURT: Very well.

Q That blanket purchase order, sir, was the activation --

A I'm sorry, no, that's wrong. I had had stock paper business prior to this, years and years before, but they didn't issue a blanket purchase order. They issued amounts. They would say 5,000,000 of so many forms to be shipped in during the year, so it was the first blanket purchase order I ever got.

Q All right, and of course Moore was operating under a blanket purchase order at that time?

A Yes.

Q And that was a system whereby you would manufacture a certain quantity of goods, and from time to time the company that you were manufacturing the product for would say "Send us X quantity of this product"?

A Except I wasn't manufacturing.

Q Somebody else then was doing it for you?

A And it was a set amount of weekly shipments.

Q In this contract that was entered into or this purchase order which you accepted in 1975, was that for a set amount to be shipped each week?

A Not on the contracts. It wasn't mentioned.

Q Was the contract itself a contract for you to produce a particular type of product?

A To supply products, and it was understood it would be shipped in weekly.

Q Was there any limit to the amount that you would ship in weekly?

A Not mentioned on the contract, no.

Q Was there any limit otherwise that you would ship in weekly?

A I knew what the weekly shipments were.

T6

Q Now, the weekly shipments that were authorized to be made, were those shipments made pursuant to the direction of any particular individual?

A Welger.

Q Mr. Welger would make a call, write a letter to somebody or a note, saying that he wanted a certain quantity of paper; is that right?

A No.

Q Mr. Welger would make the request for that paper?

A It was a -- in the beginning of the contract, you would --

Q Would Mr. Welger, sir, make the request for the paper?

A One request, yes.

Q And to whom was that request, one request, made?

A The supplier.

Q That's you?

A Right.

Q And when he made that one request in 1975, was that one request for a specific quantity?

A Yes.

Q And what was that quantity in 1975?

A You mean the weekly shipments, how many cartons or dollars?

Q Well, you can tell me in cartons and then you can tell me in dollars.

A I forget the cartons. There were several hundred cartons that they received of stock paper every week.

Q What did it amount to in dollars?

A Half the contract was worth, for six months, about $150,000, and I had half of that.

THE COURT: You had $75,000 worth of materials that you would be furnishing, as I understand your testimony, over a six-month period.

THE WITNESS: Correct.

Q And was that blanket order extended into 1976?

A Yes.

Q Was it extended at the same price as in 1975?

A Yes.

Q And Mr. Welger had recommended you as a vendor to the purchasing department for this particular purchase in 1975, isn't that true?

A No.

Q You of course are familiar with the form of the purchase orders that Pan Am issued, is that right?

A Yes.

Q And do you have any recollection of any of them in reference to this stock Tab contract bearing an indication that these orders were only to be activated at the specific authorization of Mr. Welger or his designee?

A No, I don't know that at all to be true.

Q In reference to your blanket purchase order of 1976 was that for a set weekly shipment?

A It was the same weekly, except I was shipping it every week instead of every other week. I had the whole year's contract.

Q And did Moore continue as a supplier of that same paper in '76?

A They were dropped as a supplier but they had some of the paper left in inventory and they were going to have it gradually worked off during the year.

Q That is they received no new purchase order to your knowledge but would continue to deliver that which they had already manufactured?

A No. I was the sole supplier during 1976 of stock paper with the exception of any residue that Moore had from 1975 because I had picked up some of their business.

Q So that their accumulated inventory in 1976 was, from time to time, to be used by Pan American, is that right?

A Right.

THE COURT: That was up to the extent of the portion of their 1975 contract that you had picked up?

THE WITNESS: Yes.

THE COURT: I see.

So it wasn't without limit; it was within the limits of the prior year's half contract, wasn't it?

THE WITNESS: Well, I knew what the dollar limits would be, approximately; $300,000, but it could have-- they didn't want to be limited to a certain amount.

Q That is, are you saying they had some $300,000 worth of stock left from their order which they continued to ship?

A No. When I said they, I meant Pan American didn't want to be limited or committed to a certain amount of dollar value for the stock paper so they left it open and when you already asked me another question --

Q Do you know what quantity Moore continued to ship from its existing inventory from '75 to 1976?

A Well, they weren't making continual shipments. They were making occasional shipments, working off the amount that I had picked up, which I assume they had approximately $75,000 worth of paper.

Q Are you saying that they shipped their goods on behalf of you as you fulfilled the order in 1976?

A No. I am not saying that at all.

Q Did they ship goods in 1976 relating to their contract of 1975?

A Yes.

Q Do you know what quantity they shipped in '76?

A No.

They also shipped to other areas that I didn't ship to, under other contracts.

THE COURT: In other words, Pan American issued several blanket contracts?

THE WITNESS: Well, no. I am sorry. It wasn't a blanket contract but they used the same paper out at the airport and could use that same paper as a shipper, under a different purchase order.

THE COURT: As I understand it, then, your shipments were to Rockleigh, New Jersey?

THE WITNESS: Correct.

THE COURT: But Pan American might well be using the same type of paper at other Pan American facilities?

THE WITNESS: In small quantities.

Now, they were going to work off Moore's $75,000 worth of paper, some at Rockleigh and some at the other facilities over some time period but I had the weekly shipment of stock paper out to Rockleigh.

BY MR. FRIEDMAN:

Q Tell me, sir, in reference to your price structure in the trade is it true that certain prices were charged to those people who were wholesalers in the business?

A You mean -- yes. Are they like jobbers or brokers?

Q Within the business itself, was price structure to some extent divided depending upon where one was a retailer or a jobber or a wholesaler?

A Yes.

Q And the retailer paid a higher price than a wholesaler for a like product, is that right?

A Correct.

Q And the jobber paid less or more than the wholesaler?

A There weren't any wholesalers in this business.

Q Just jobbers?

A Right.

Q And he paid less than the retailer?

A Correct.

Q Was there any other category of person doing this type of business besides retailer or jobber?

A Well, sometimes he wouldn't pay less. Sometimes the retailer would have such clout that they might buy directly from the manufacturer for less than the wholesaler or the retailer.

Q Was Pan American in such a category in reference to this type of paper that, the Tabulating stock form?

A Well, they were close on that. That was a lot of business.

Q So they would negotiate the best price, the lowest price for them and have the kind of a cloud of a big retailer?

MR. KINGHAM: Objection.

THE COURT: Sustained.

MR. FRIEDMAN: I will withdraw it.

Q Mr. Barney, if I understand your testimony correctly, you stated that when you first met Mr. Hasenstab you gave him small amounts of money, fifty or a hundred dollars from time to time.

A Not immediately. After I got to know him.

Q After you got to know him.

And up until that time that you gave him fifty or a hundred dollars, Mr. Hasenstab hadn't done anything in particular for you, had he?

A No. Well, he'd let me in on the paper, on the forms.

Q He hadn't done anything special for you, had he?

A No.

Q And you I assume were trying to curry some favor with Mr. Hasenstab and become his friend when you gave him the fifty or the hundred dollars?

A Well, I was trying to be, get close to him by drinking with him at Charlie Brown's.

Q But when you gave him the fifties and the hundreds, you were really trying to buy him, weren't you?

A No. I was just doing what he wanted.

Q But you were doing what he wanted because you were trying to buy him, so you could get orders, isn't that right?

A I guess -- well, correct.

Q And you felt, I assume that if you continued to give him some money and he accepted money, that sooner or later he might feel a certain sense of obligation to you, isn't that correct?

A No. He indicated that was the way he was going to do business and if I was going to do business with him and grow in the account that's what I had to do and in my mind I had to do it.

Q He sort of put a gun to your head verbally, is that what you are saying?

MR. KINGHAM: Objection.

THE COURT: Sustained.

Q Are you telling this jury that Mr. Hasenstab told you that you would have to pay him if you were to do business with that company?

A He told me he wanted money.

Q Would you answer my question, please, sir?

Did Mr. Hasenstab tell you then when you were giving him the fifties or the hundreds that you would have to pay him in order for you to do business with the company?

A He told me that he only wanted whatever I was worth to him, whatever that was. He said, that's all he expected from anybody.

Q But in that conversation, sir, where he left it up to your judgment as to what you were worth, did he tell you that you had to pay him for you to get business from this company?

A No.

Q As a matter of fact, when you gave him the first fifty, you gave it to him as a gratuity, isn't that true?

MR. KINGHAM: Objection, your Honor.

THE COURT: Sustained. Sustained as to form "as a gratuity."

Q When you gave him the fifty, you didn't give him the fifty on any demand by him, did you?

A No.

Q And at that time were you, as a part of your business practice, giving money to other people who were in the position of buying agents with different companies?

A I think at that time I was giving it to one fellow and he was a data processing manager.

Q A data processing manager?

A Right.

Q In Pan American?

A No.

Q Some other company?

A No. Hartz Mountain.

Q After some period of time of giving these fifties or hundreds, you say you had had a strike at your business?

A Correct.

Q And you had financing problems with carrying the orders from Pan American, is that right?

A Yes.

Q And was that in some way due to the fact that Pan American did not pay you before delivery so you couldn't in some fashion financially produce these goods, afford to produce the goods, because payment was delayed?

A Correct.

Q And so you stopped making bids or taking orders from Pan Am?

A Yes.

Q And then --

THE COURT: We will take a recess at this time. It is 12:30. I indicated to the jury we would take our luncheon recess at this time and we will do so.

Ladies and gentlemen, we will resume at 1:30 P.M. Number 1, please do not discuss the case among yourselves or with anyone else. In the event you learn anything about this case from any source outside of the courtroom, you are directed to report the matter to me at once on your return.

Finally, as I say all the time as we break, please keep an open mind on all facets of the case until the case has been completed and given to you following my charge.

The jury is excused.

You are directed to return to resume hearing this case at 1:30 P.M.

Enjoy your lunch.

(Luncheon recess)

p.m. mblt 1

AFTERNOON SESSION

1:30 p.m.

(In open court - jury present.)

THE COURT: Good afternoon, ladies and gentlemen.

We will resume with the cross examination of Mr. Barney.

GEORGE J. BARNEY, resumed.

THE COURT: You may proceed, Mr. Friedman;

MR. FRIEDMAN: Thank you, your Honor.

CROSS EXAMINATION CONTINUED

BY MR. FRIEDMAN:

Q Mr. Barney, you have mentioned the Hartz Mountain case in the course of your testimony.

You recollect that, don't you?

A Yes.

Q Were you indicted in connection with your activities with Mr. Corey of that company?

A Yes.

Q And you were not -- withdrawn.

Under your arrangement with the government concerning the guilty pleas that you have entered and upon which you are awaiting sentence, those guilty pleas did not have anything to do with your participation in the Hartz Mountain case, did they?

A No.

Q You entered those pleas in connection with, I think, the Drexel Burnham case?

A That's correct.

Q And in the Hartz Mountain situation, did you pay just one person?

A Yes.

Q Was that Mr. Corey?

A Yes.

Q And did you pay him a total of about $50,000?

A Yes.

Q And did you pay that money in an effort to get business for your company?

A Yes.

Q And Mr. Boland, Art Boland, I think you say you paid him about $50,000?

A Yes.

Q And what company was he associated with?

A Drexel Burnham.

Q And did you pay him in an effort to gain his friendship?

A No, they -- no, no, not at all. It was just a business arrangement.

Q Welger was friendship, but Boland was business?

MR. KINGHAM: Objection, your Honor.

THE COURT: Sustained.

Q Did a man at Chemical Bank -- what was his name?

A There were two of them.

Q What were their names?

A Vincent Molinari and Tony Maniscalco.

Q And you paid $7,000 to Molinari?

A Yes.

Q And that was in return for -- withdrawn.

Did you have a motive in paying him that $7,000?

A Yes.

Q What was that motive?

A To continue doing business there.

Q What kind of business?

A The business I had bid on and got.

Q I didn't hear the answer.

A Regular business forms, business that I bid on and was awarded.

Q To be able to supply paper?

A The situation there was a little different than the others.

Q You had been doing business with that bank supplying certain forms to them.

A Yes.

Q Is that true?

A Right.

Q And when did you start to give Mr. Molinari money?

A I think it was 1974, in June.

Q When did you start to give Mr. Boland money?

A I think it was 1974.

Q When did you start to give Mr. Corey of Hartz Mountain money?

A 1965.

Q And did you continue to pay Mr. Corey from time to time from 1965 to the time of the indictment in that case?

A Yes.

Well, a short time before it. He retired. We stopped it then.

Q And Mr. -- who was the other man at the bank, Molinari and who?

A Maniscalco.

Q How much did you pay Maniscalco?

A About $3,000.

Q And if I heard you correctly, you paid D'Angelo and Citrone $25,000?

A Right.

Q What company or enterprise was he with?

A Camelot Business Forms.

Q When did you start to pay Mr. Citrone money?

A I forget, but --

Q Was it in the '60s or '70s?

A '70s.

Q And did Mr. Citrone tell you that unless he got money you couldn't do business with that company?

A It was a different arrangement there also.

Q Different arrangement at the bank?

A Right.

Q Different arrangement with Citrone?

A Right.

Q And H.I.S., when did you start making payments to that company?

A Around '68.

Q That was about $3,000?

A Right.

Q Solomon Brothers, when did you make payment to them?

A In the '70s.

Q How about payments to someone at Moore Business Forms? When did you start making payments to Moore Business Forms?

A September of '75.

Q And to Mr. Hedges,I think you used that name, when did you start payments to him?

A '70s, '60s, I forget.

Q And to Mr. Bob Just?

A In the '70s.

Q You paid him $3,000 you told us?

A Right.

Q Is that your recollection?

A Right.

Q By the way, did you keep any notation or written records of these amounts that you paid out to all of these different people over the years?

A As I -- no, I didn't put down the sums. I didn't keep an accurate record, no.

Q And the numbers that you gave us today are approximations to the best of your recollection?

A Yes.

Q And you paid $5,000 to a union head of some factory?

A No.

Q Did you say you paid $5,000 to some union man?

A Yes.

Q A member of the Teamsters Union?

A No.

Q What union?

A I forget. He started out as the Novelty Workers Union and he changed it to another name and I don't know the name. I can't remember.

Q You don't remember that man's name?

A No.

Q When did you start making payments to that man?

A I only paid him once.

Q When did you pay him that $5,000?

A The end of the strike.

Q When was that?

A September of '70.

Q That was the strike in your plant?

A Yes.

Q And you don't remember the name of the man you paid that $5,000 to?

A No.

Q To settle that strike?

A No.

Q At the time of that strike, you had about 45 employees working for you; didn't you?

A Yes.

Q And those employees, were they laid off during the strike?

A Well, they struck.

Q Pardon me?

A They struck.

Q All of them struck?

A Well, the --

Q Let me rephrase it. I will withdraw that question.

Did your business stop functioning then?

A No.

Q And did you pay that man from the union the money directly?

A Yes.

Q How long before you made the payment to him had you known him?

A Well, he visited me before the strike; a few days.

Q Aside from the union man, do you remember now paying anybody else money in the course of the conduct of your business for the purpose of -- withdrawn.

These people to whom you paid this money, did you in fact pay them, having in mind that this would help you get business?

A The circumstances varied.

Q Did you pay some of them having in your mind the idea that this would help you get business?

A Well, no, I paid it to get the business, not that it would help me.

I had it -- if I didn't pay the money where I was making payoffs, I wasn't going to get the business.

Q Are you saying that all of these people would not have given you the business unless you paid them off? Is that your testimony?

A I wouldn't have gotten the amount of business or profitable business if I hadn't .

Q Did any one of these people -- withdrawn.

Did all of these people say that to you, that you wouldn't get the business unless you paid off?

A No, well, yes, the situations varied.

Q These people that you started to pay -- withdrawn.

When you started to pay them, did you pay them small amounts of money at first?

A The situations varied.

Q Were there some whom you paid small amounts of money?

A Yes.

Q And you gave it to them kind of as a gratuity?

MR. KINGHAM: Objection, your Honor.

THE COURT: Sustained.

Q You paid it to them even though you had no agreement with him that they would give you any special service or benefit?

A No.

Q Is your answer, sir that --

A Please rephrase the question.

Q All right, sir.

Did you pay some of these people small amounts of money in the beginning even though they had not given you any special service or benefit?

A Yes.

Q And as your relationship with some of these people developed, you kept on giving them more money from time to time; is that right?

A It varied.

Q With some of them?

A Right.

Q And needless to say, their being human, as you say, they got kind of used to taking your money; is that right?

MR. KINGHAM: I object to that, your Honor.

THE COURT: Sustained.

Q They did continue to accept your money, didn't they?

A Yes.

Q And some of those people, as in this case, Mr. Hasenstab, never said to you, "If I don't get the money you won't get the business", isn't that correct?

A Well the situations again varied.

Q I say some of those people were the same as this situation which you have testified to about Mr. Hasenstab, that is, some of these people who took your money didn't say to you "If I don't get the money, you won't get the business"

MR. KINGHAM: I object, your Honor.

THE COURT: Sustained.

Q If I total up all this money that you have testified you paid out accurately, I come to the number of $123,400.

Does that sound to you as an accurate summation of the amounts you say you paid?

A No, off the top of my head. No.

I come off with three 50's. That's 150.

Q I can't hear you.

A I come off with at least three 50s right away. That's 150.

Q You're right.

Somewhere in excess of 150 or 200 thousand dollars?

A Somewhere around there, yes.

Q Did you ever do any business with any company where you didn't pay something of value to somebody in the company?

A The vast majority.

Q The vast majority of what?

A Of my customers.

Q You paid?

A Didn't pay.

Q Did not pay?

A Right.

Q When you say in reference to the dollar volume business of your company over the course of these more recent years, would you say that those companies where you paid some individual in the company, gave you the bulk of your business?

A Yes.

MR. FRIEDMAN: May I have, Mr. Kingham, those receipts from the restaurant in Queens?

(Handed.)

Q I show you Exhibit 8 and I show you Exhibit 9, Government's exhibits, and ask you, did you receive those or obtain those at the same time?

A No.

Q Which one did you receive first?

A I don't know.

Q May I have that 8 back please?

The contents of the envelope, Exhibit 8, are records of -- withdrawn.

The contents of the envelope, Exhibit 8, is a form of a bill from the Chelsea Restaurant.

A Yes.

Q But it is not filled out in any way, it is just a blank form; is that right?

A Correct.

Q And that's true as to 9, Exhibit 9, they are all blank forms, aren't they?

A Yes.

Q Was it your testimony that you received all of Exhibit 9 from Mr. Hasenstab?

A All of them.

Q And at the time you received them, you were undergoing a tax audit?

A No, -- yes, I was, yes, yes.

Q And you wound up, as a result of that tax audit, paying some $23,000, you told us?

A Correct.

Q Is it your testimony, Mr. Barney, that Mr. Hasenstab, this supervisor for Pan American, suggested that you use these blank receipts from the Chelsea Restaurant to increase your tax deductions so you could minimize your tax liability?

A Correct.

Q Your tax liability was ultimately settled in the amount of $23,000, right?

A Yes.

Q And according to your testimony, as I understand it, over the years preceding your tax audit, you were paying out substantial sums of money to different people and charging that as a business expense?

A Correct.

Q You can't really mean to imply to us that Mr. Hasenstab suggested that you use these dinner chits to reduce your tax liability, do you?

M.R KINGHAM: Objection.

THE COURT: Sustained.

Q How many Chelsea -- about how many Chelsea receipts did you use,if any, in connection with your tax audit?

A Every time you see the white copy missing, I used that receipt.

Q Do you know how much you wrote off or was accepted as a deduction by the government by reason of those Chelsea receipts that you allege?

A Everything was disallowed.

Q In fact, Mr. Barney, isn't it true, that the giving of money in the conduct of your business was even before you met Mr. Hasenstab a way of life by you in the conduct of your business?

A No.

Q Did you ever pay anybody money before you gave what you have described as small amounts to Mr. Hasenstab?

A Did I ever? Well we know that, yes.

Q Sure. And you were doing that with frequency in the conduct of your business in those earlier years, weren't you?

A No, infrequent.

Q The frequency increased; isn't that true?

A Yes.

Q And at any time, Mr. Barney, did you ever send to Mr. Hasenstab any money in the mail?

A No.

Q At any time did you send Mr. Hasenstab any money by use of the wireless system, that is wire him money for his personal benefit?

A No.

Q As a matter of fact, the mailings which you have testified to concerning your business with Pan American was the regular method of doing business with Pan Am; isn't that true?

A Yes.

Q And all the times that you gave Mr. Hasenstab money that you have testified to, you gave it to him in person; isn't that right?

A Correct.

Q And I believe you said that the figure of 5 percent, that was an amount which you thought should be paid to Mr. Hasenstab; isn't that right?

A That was the figure I came up with, yes.

Q And as a matter of fact, neither you nor Mr. Hasenstab had any plan or scheme to use the mails or the telephone to defraud Pan American.

THE COURT: Sustained.

MR. KINGHAM: Thank you, your Honor.

Q Lastly, Mr. Barney, you haven't been sentenced yet by Judge Owen, have you?

A No.

Q Has you r sentencing date been fixed?

A Yes.

Q Do you know when it is for?

A I believe September the 29th.

Q Had there been any earlier sentencing date which was then adjourned?

A Yes.

Q And was it adjourned at the request of the government?

A Yes.

Q That was to await your testimony in connection with this case?

A I assume so, yes.

Q And the sentencing by Judge Owen, you said, was in reference to two counts?

A Yes.

Q Each of them having I think you called it a five-year exposure?

THE COURT: No, he said ten. You went through this once, but if you want to go through it again, what is th exposure, if you know?

THE WITNESS: Five years each.

Q And one charge is wire fraud?

A Yes.

Q And one charge is conspiracy?

A Yes.

Q Conspiracy to violate the wire fraud or mail fraud laws, is that right?

A Conspiracy to defraud, yes.

MR. FRIEDMAN: That concludes my examination, if your Honor please.

THE COURT: Mr. Kingham?

MR. KINGHAM: I have no redirect, your Honor. Thank you.

THE COURT: You are excused, sir.

(Witness excused.)

MR. KINGHAM: The government calls George Kassab.

GEORGE KASSAB, called as a witness on behalf of the government, having first been duly sworn, testified as follows:

THE COURT: You may proceed, Mr. Kingham.

MR. KINGHAM: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. KINGHAM:

Q Mr. Kassab, how are you employed, sir?

A I am director of internal audit for Pan American World Airways.

Q Are you an accountant?

A Yes, I am a CPA in the State of New York.

Q How long have you been in your present position with Pan American?

A Three years.

Q What in general are your duties with that corporation, sir?

A I assist the general auditor in the supervision of the Audit Department to include supervising and assigning staff personnel to various audits. I review work papers and audit reports, and I administer the conflict of interest program for Pan Am.

Q Mr. Kassab, let me show you, if I may, Government's Exhibits 13A through 13I for identification.

Would you look at those pieces of paper?

THE COURT: Have you purposely skipped 12, Counselor?

MR. KINGHAM: I have, your Honor.

THE COURT: Very well. 13A through I.

Q Do you recognize those pieces of paper?

A Yes, I do.

Q What are they, sir?

MR. FRIEDMAN: I object to testimony as to their contents.

THE COURT: He's asked to describe them. I am going to permit that.

MR. FRIEDMAN: I have no objection to that, Judge, to a general statement as to what they are.

MR. KINGHAM: That's the question.

THE COURT: That is the substance of the question, right.

(Continued on the next page.)

T2 pm

Q What are they?

A This is an annual preparation by our disbursement department of activities or payments made to various vendors on an annual basis and these represent payments to selected vendors for the years 1968 through 1976.

Q Is Tabulating Stock Forms, Incorporated included on those yearly totals?

A Yes, they are.

Q And are those forms made and maintained in the regular course of business of Pan American World Airways, Incorporated?

A Yes, they are.

Q Is it the regular course of business of Pan Am to prepare and maintain those yearly summaries?

A Yes, it is.

Q And those are summaries of payments to vendor by year, is that correct?

A Yes, sir.

MR. KINGHAM: Government Exhibits 13A through 13I for identification are offered in evidence as 13A through I respectively.

THE COURT: Show them to counsel.

MR. FRIEDMAN: I have no objection.

THE COURT: Received.

(Government Exhibits 13A through I received
in evidence.)

xx

MR. KINGHAM: Perhaps we can have them marked off later. It might take a while to go through all the documents.

THE COURT: All right. Just the first one, then.

I want it clear, is there one schedule per vendor or does it vary?

MR. KINGHAM: I will put a question.

THE COURT: They are in evidence.

MR. KINGHAM: They are quite lengthy and we have a summary.

Q With respect to Government Exhibits 13-A through 13-I are these the vendor activity reports reflective of the total payments to Tabulating Forms, Inc., for the years 1968 through 1976?

A Yes, they are.

Q And those are prepared in the disbursement section of the company, is that correct, sir?

A Yes, sir.

Q Let me show you Government Exhibit 14 for identification and ask you if you recognize that.

A Yes, I do.

These are the annual payments to Tabulating

Stock Forms.

THE COURT: Where do the figures which are on 14 originate? Where do they come from?

THE WITNESS: From this, your Honor.

THE COURT: Indicating 13.

Q Have you had occasion, Mr. Kassab, to compare the entries on Government Exhibits 13-A through 13-I with the amounts and years listed on Government Exhibit 14 for identification?

A Yes, sir, I have.

Q You have done that before coming to court, is that correct?

A Yes, sir.

Q And are the amounts and years listed on Government Exhibit 14 for identification accurate transcription in summary fashion of the amounts listed on 13-A through I identification?

A Yes, sir.

MR. KINGHAM: Government Exhibit 14 for identification is offered as Government Exhibit 14 by way of summary.

THE COURT: Very well. It is a summary to be illustrative of information which appears on 13.

Before showing the item to the jury, would you display it to counsel?

MR. FRIEDMAN: We have seen it, your Honor.

THE COURT: Is there an objection? And it is to be used for illustrative purposes only.

MR. FRIEDMAN: We have no objection to it.

THE COURT: Received.

xx (Government Exhibit 14 received in evidence.)

MR. KI[illegible]CHAM: May I read from and point to Government Exhibit 14 now in evidence?

THE COURT: Yes, you may.

MR. FRIEDMAN: On this issue we feel it is cumulative on the testimony that's been offered in this trial.

THE COURT: Overruled.

I didn't hear a word of testimony giving the figures. I heard the basic evidence being offered and it would be a blank, as far as I am concerned. I couldn't possibly figure it out and maybe the jurors eventually would want to take the other document in and add it all up; they can do that but I think counsel has a right to do what he is about to do and I will overrule your objection.

MR. FRIEDMAN: We will abide by your ruling, your Honor.

MR. KINGHAM: Thank you.

Reflecting Pan Am payments to Tabulating Stock Forms, the year 1968, $58,963; the year 1969, $178,990; the year 1970, $107,227; 1971, $50,413; 1972, $48,467; 1973, $68,648; 1974, $127,436; 1975, $274,586 and 1976, $498,659.

Q Mr. Kassab, have these figures been rounded off to the nearest dollar?

A Yes, they have been.

MR. KINGHAM: No further questions, your Honor.

THE COURT: Mr. Friedman, you may inquire.

CROSS-EXAMINATION

BY MR. FRIEDMAN:

Q Mr. Kassab, in the course of your preparation for this trial or otherwise, did you have occasion to do a tabulation --

A A tabulation?

Q A tabulation of the business that your company did with Moore Forms for the years in question?

A Yes, sir.

Q And did you have occasion to do a tabulation in respect to other form paper suppliers to Pan Am for the years in question?

A Yes, sir.

Q And in fact in reference to the amounts shown on the government exhibit for illustration, your company did in fact order and did receive goods having the valued amount set forth on the chart, isn't that right?

A Having these amounts, yes.

Q Yes. In other words, that shows the amount of business you did with this company, Tabulating.

A Yes, it does.

Q It isn't that you didn't get the goods? You got the goods, right?

A Right. We received the goods.

Q Do you know now how much dollar volume of business you did year by year with Moore Forms from 1968 through 1976?

A I do not have the schedule with me right now.

Q Well, do you have any recollection as to the overall amount?

MR. KINGHAM: Objection to relevance, your Honor.

THE COURT: Well, if he knows, he can tell us. If he doesn't know he will say no.

A I noticed a corresponding decrease in our payments to Moore with the corresponding increase to Tabulating Forms purchases.

MR. FRIEDMAN: I move to strike the answer as unresponsive. The question was, does he know the amount of business that Moore did.

MR. KINGHAM: I think it is entirely responsive in light of the previous question.

THE COURT: I will hear the question and the answer and rule on the objection.

Mr. Reporter, please.

(Record read)

THE COURT: I will let the answer stand.

Q I will ask you the question, sir, again:

Do you have any recollection as to the overall amount of dollar business your company did with Moore Forms from 1968 through 1976?

A Exact dollars, no.

Q I didn't ask you that exact dollars. Approximate.

THE COURT: Approximate.

A No.

Q Can you tell us if it was in the hundreds of thousands of dollars?

MR. KINGHAM: I object, your Honor.

Q Does that refresh your recollection?

MR. KINGHAM: I object to that, too.

THE COURT: No. I will let him refresh the witness' recollection. It is cross-examination. If the witness at one time knew but can't tell us now, he is entitled to have the opportunity to refresh the witness' recollection.

If that refreshes your recollection --

THE WITNESS: No.

THE COURT: It does not. Nothing we can do about that.

Next question.

Q Do you have any recollection --

A The answer is no, I don't.

Q Do you have any recollection as to whether the amount was between 500,000 and $1,000,000 over that period of time?

A Again, I don't remember the exact dollars, sir.

Q I didn't ask you about the exact dollars.

A Or an approximation.

Q Are you saying that you, as a gentleman who went through these figures can't tell us within a range of $500,000, that is whether or not it was between $500,000 and $1,000,000? Is that what you are saying?

A I am saying I don't want to give any misleading answers.

Q We don't want you to give any misleading answers, sir. We only want your best recollection and I ask you, sir, do you have any recollection as to whether or not it was between 500,000 and 1,000,000?

A It goes below a half a million dollars.

Q Over what period of time?

A For 1976.

Q Now, between 1968 and 1976, then it would have been over one half million; is that right?

A I did not say that.

MR. KINGHAM: Your Honor, I object to continuing on this line, it is a hearsay objection.

THE COURT: Yes. I suggest that that is a valid objection.

In any event, the last question has been answered and I will let it stand.

Q 1976 under a half million you say is your recollection?

A I believe so, yes, sir.

Q Do you recollect whether it was between four and five hundred thousand?

A No, sir.

Q Do you have any recollection as to the amount?

A No, I don't.

Q I didn't ask you the question yet --

A Sorry.

Q In reference to the year 1975, do you have any recollection now as to whether it was over or under one half million dollars?

MR. KINGHAM: Same objection. Hearsay.

THE COURT: Yes. Sustained.

Unless you can tell me that you handled the business yourself.

THE WITNESS: I did not, sir.

THE COURT: Very well.

Q Where are your computer printouts, sir, which would show the business that your company did with Moore Business Forms during the same time period? Do you have them here?

A No, sir, I do not.

Q Where are they?

A I assume they are in the corporate files right now.

Q Do you know the names of any other vendors supplyin

Pan American with paper products?

A Yes, sir.

Q Do you know the names of any vendors who supplied Pan Am during 1968 and 1976?

A Yes, sir.

Q Does this Government Exhibit 13-A which you brought to court show the names of any of those other compani

MR. KINGHAM: May I inquire if counsel is looking for the records as they relate to Moore Business Forms?

THE COURT: He seems to be but if he --

MR. KINGHAM: Well, I can produce those.

THE COURT: You have them? Well, if counsel wants them, then they are available.

MR. KINGHAM: Sure.

MR. FRIEDMAN: That's very helpful. May we have those and I will withdraw the other question.

THE COURT: All right. Withdrawn. Apparently there are some documents in Mr. Kingham's hands which I gather he is going to present to counsel.

(Documents handed to Mr. Friedman by Mr. Kingham.)

MR. FRIEDMAN: Thank you.

Q Mr. Kassab, the records which you hold in your hand, the government's exhibit, do you know how they got to this courtroom?

A Me personally, no, sir.

Q Did you bring them here?

A No, I did not.

MR. FRIEDMAN: In view of the fact that you have given me these documents, would you concede that these documents are the same type as have been identified by Mr.

Kassab --

MR. KINGHAM: I have no objection to their being marked and received in evidence on that basis, your Honor.

MR. FRIEDMAN: May we do that?

THE COURT: Yes. That will be the next defendant' exhibit which is K, I believe.

MR. KINGHAM: I do, however, press a relevance objection.

THE COURT: Well, I will allow him.

MR. KINGHAM: Half-heartedly.

THE COURT: I don't care how strenuously or nonstrenuously you choose to press the objection but it is cross-examination and I will allow it.

MR. FRIEDMAN: Thank you.

THE COURT: I gather these are schedules of payments to Moore for the same period, is that right?

MR. KINGHAM: Yes, they are.

THE COURT: They are received. Objection overruled for the record.

xx (Defendant's Exhibit K received in evidence.)

Q Now, Mr. Kassab, will you look at Exhibit K and is there a sheet there for 1968?

A Yes, sir.

Q Is Moore Business Forms listed on that sheet?

A More than once.

Q Would you tell this jury in reference to each listing for Moore Business Forms the dollar value of business as a vendor it received from Pan Am in 1968?

A Moore Business Forms, location, San Francisco, California, the amount is $1,340.69.

Q Repeat the number please.

THE COURT: I gather there are going to be a lot of numbers counsel.

MR. FRIEDMAN: I am trying to write it down correctly.

THE COURT: If there will be 50, are we going to sit here while he reads them off? They are on the record here.

MR. FRIEDMAN: All right, Judge.

THE COURT: Is there a total on this document?

THE WITNESS: There is one significant disbursement to one major location.

THE COURT: Would you have 1, 2 or 50 entries that you are going to be reeling off?

THE WITNESS: Four.

MR. KINGHAM: I believe there are four as to each sheet.

THE COURT: Fine. We will take them as to each sheet. I heard a thousand dollars and I was preparing for the worst. Now we can go on.

MR. FRIEDMAN: I would like to use that procedure if I may.

THE COURT: Certainly.

MR. FRIEDMAN: Thank you so much.

THE WITNESS: Do you want the first number repeated?

THE COURT: Yes.

THE WITNESS: $1,340.69.

276,294.28. $158.65. 4,883.13 for the year 1968.

Q And will you read '69, please, if any are listed?

A Moore Business Forms, 1969, 224,561.41. $961.47. $1,058.73.

THE COURT: Just three entries for that year?

THE WITNESS: Yes, sir.

1970. For 1970 there is going to be six entries.

THE COURT: All right.

A $954.53. 165,905.58. $275.71. $16,775.44. $757.08. $1,691.20. That's for the year 1970.

THE COURT: 1971.

THE WITNESS: 1971.

$130,728.80. $2,760.91. $427.71. $6,935.04.

For the year 1972: 315,095.40. $2,699.67. 2,210.61. 3,706.65.

For the year 1973:

342,904.33. $29.58. $838.30. $352.20.

For the year 1974:

$416,920.66. $9,373.94. $830.07. $2,658.48. $357.25.

For the year 1975:

503,322.66. 7,207.29, 5,028.31. 5,025.67.

For the year 1976:

265,702.75. 5,194.97.

THE COURT: Is that it?

THE WITNESS: Yes.

BY MR. FRIEDMAN:

Q In all of those cases those moneys paid out represent the purchases for goods sold and delivered?

A I can only say that these were payments made to Moore Business Forms.

Q Well --

A I wasn't -- I cannot vouch for the delivery of these items.

Q But that's what it was paid for?

A Yes, sir.

Q It was paid for goods?

A Yes.

Q How did you happen to come here today to testify?

A I was asked to --

Q Someone tell you there was a trial going on here?

A Yes, sir.

Q Who could that have been?

You are pointing?

A The prosecutor, Mr. Kingham.

Q When did Mr. Kingham first notify you that your presence would be requested here?

A Friday, August 19th.

Q And did you have anything to do with the preparation of this chart which has been marked for illustrative purposes as an exhibit here?

A In terms of this chart, I had the schedule from which this was taken.

Q You provided the information so the chart could be made up, right?

A Yes, sir.

Q And then you were told that you would be called as a government witness in this case, is that right?

A Yes, sir.

Q In the course of your duties as an auditor for the company, did you do any audit, the results of which you made available to the government?

A Would you specifically -- would you rephrase the question, please?

Q Other than in reference to the computer printout which you hold in your hand, that type of form, did you do any type of an audit, the results of which you gave to the government in connection with this case?

A An audit was performed of our material and logisti department of which --

THE COURT: Go ahead.

A -- of which the buying unit which produces these payments or which is responsible for selection of vendors--

ake 3 p.m.

Q Is that a --

THE COURT: Wait a minute. I don't think he is finished.

Was what? Their activities were reviewed?

THE WITNESS: Yes.

THE COURT: Very well.

Q Was that a report that was ultimately issued over the signature of a Mr. Guarnieri?

A The report was issued under -- over Mr. Guarnieri signature, yes, sir.

Q And is Moore Forms still a vendor to the company? If you know.

A To date?

Q Yes.

THE COURT: If you know.

A I don't know exactly. I would --

THE COURT: You're not supposed to guess. If you know you should tell us.

A Okay. No, okay.

Q Do you know whether or not Tabulating Stock Forms is a vendor to the company?

A No they're not, not to date.

Q Were they a vendor during some time of this year?

A No, sir.

Q And of course they were a vendor in 1976?

A Yes, sir.

Q And that business apparently has closed down; is that right?

MR, KINGHAM: I object, your Honor.

THE COURT: Well, I think it is a conclusion. I think you have covered the point.

MR. FRIEDMAN: All right. I have no more of Mr. Kassab.

MR. KINGHAM: No redirect, your Honor.

THE COURT: All right, you are excused, sir. Would you leave the exhibit, and you may leave.

(Witness excused.)

MR. KINGHAM: May I have a moment, please?

THE COURT: Yes.

(Pause.)

MR. KINGHAM: Your Honor, the government rests.

THE COURT: The government rests. Very well.

Ladies and gentlemen, I am going to take our afternoon recess at this time. It will be about ten minutes. There are some legal matters that I will take up. Then I will bring you back for the rest of the afternoon. We will be recessing today I would think somewhere between 4:30 at the earliest, and 5 o'clock at the latest. All right.

That's what I said yesterday. You know where I wound up. Today I don't guarantee a thing.

Please, although the government has completed the presentation of its direct case, you should not discuss the matter among yourselves. Please keep an open mind on all facets of the case until all of the evidence is in and you have heard my instructions on the law. It will be about ten minutes.

(The jury left the courtroom.)

THE COURT: We will be a moment and then we will proceed to legal matters.

(Pause.)

THE COURT: Does the defendant wish to make any motions at this time?

MR. FRIEDMAN: Yes, your Honor.

If your Honor please, I move to dismiss on the grounds that the government has not made out a prima facie case on the facts and the law; specifing the following as the basis for my motion:

As I understand it, the government takes the position that the mailing of documents in the nature of invoices and the payment of goods constitutes use of the mails as to fall within the statute.

THE COURT: The Court takes the same position, so I can put your mind at ease as to the law as I see it.

MR. FRIEDMAN: Now I am going to try, if your Honor will permit me, to disabuse you from that theory.

THE COURT: Give me any case. You have already cited Maze, which I distinguished. Any case which you believ validly supports the position which you urge.

MR. FRIEDMAN: I believe that the language of Maze which says that the mailing must play a significant part in the scheme is applicable to this case.

THE COURT: The scheme here could never have been carried out if Pan Am did not pay for those purchases. You heard the tapes on that.

MR. FRIEDMAN: I would like to have your Honor do me the courtesy, please, of hearing my argument of the theory of the defendant's case, if I may.

THE COURT: You may expound at length from beginning to end.

MR. FRIEDMAN: I don't want to be heard at length and I don't think it's necessary for your Honor, with all due respect, to yell at me.

THE COURT: The jury is not present, Counsel.

MR. FRIEDMAN: It is still unnecessary, Judge.

THE COURT: You have, by your conduct so far, I must suggest, led me to wonder, and I can't suggest more. I will listen. You can expound at length.

MR. FRIEDMAN: Thank you, Judge.

In the Maze case, and in the Bryza case, which I am sure your Honor is familiar with, I think that is spelled B-r-Y-z-a, in those two cases specifically, what I will call the fruits of the conspiracy or the fraud --

THE COURT: You better cite Briza, which I am not familiar with. I'd like the citation, and the Circuit.

MR. FRIEDMAN: I shall be glad to give it to you, Judge.

THE COURT: You have not favored me with that to date and I would appreciate getting it now.

MR. FRIEDMAN: Yes, Judge. I will give it to you right now. I'm sorry that I have omitted that. That's United States v. Bryza. That's the Seventh Circuit, cited in 522 Federal Reporter 2nd, 414. It is a decision of 1975, August 25th is the specific date, rehearing denied, en banc February 12, 1976.

And I may, if I may hand that case up to your Honor, if your Honor does not have familiarity with it --

THE COURT: I have no familiarity with this particular case, and I will study it now.

MR. FRIEDMAN: Shall I continue to discuss this?

THE COURT: No, I suggest that if you rely heavily upon this case, it would be helpful if I read it. I have rea the Supreme Court decision to which you have made reference and I might as well read this one.

(Pause.)

THE COURT: I note there was a conviction. I note the conviction to have been affirmed. I suggest if your point is that the government has not proved that the defendant knowingly performed acts with an intent to violate the mail fraud statute, it is clear to me just from listening to the tapes that the government proves its case on that.

I note also the comments about a deprivation of an employee's loyal services can amount to actual fraud under the mail fraud statute.

It seems to me that that goes against your position, but I will continue and read it all.

(Pause.)

THE COURT: I must suggest I note this language at page 22:

"Even though IH" -- International Harvester -- "was satisfied with Bryza's job performance and the products he purchased for IH from its suppliers, and despite the fact that no preferential treatment beyond receiving business was accorded the suppliers, that the suppliers' prices to IH were fair and reasonable; that IH was never shown to be dissatisfied with the suppliers' prices or products and that

Bryza insisted upon efficiency, quality, fair prices from the suppliers, Bryza's conduct nonetheless falls within the purview of the mail fraud statute. The fraud consisted in Bryza's holding himself out to be a loyal employee acting in IH's best interests, but actually not giving his honest and faithful services, to IH's real detriment."

I have completed a review of the decision and will hear you.

MR. FRIEDMAN: Thank you, Judge.

May I have the case?

Your Honor having read that case, your Honor will see that the essence of the use of the mails in the Bryza case is the payments that were made to the purchasing agent were sent through the mails, unlike this case. The receipt by the company agent and the use by the parties of the mails for the purpose of completing that scheme was the mailing of the checks in payment for the influences of the agent to the agent under the name of a dummy company, Searsport, which he had set up, and I suggest to you that under Maze and under

it is that type of specific use of the mails which the U.S. Supreme Court talks about and Bryza talks about, not the ordinary use of the mails in the ordinary practice of the business of the company in the sending of invoices; and I suggest that the specific thing which is the benefit sought by the dishonest employee, must be a thing which is obtained through the mail, and without a specific showing of the person who is alleged to have perpetrated the fraud, receiving whatever he is seeking to get, whether it's a credi card conspiracy or a dishonest employee conspiracy or any other type, where that which he gets which it's said he shoul not get because of fraud, it must come through the mails.

THE COURT: If that is your theory, I disagree with it and I will explain to you why.

A fraud consists in part at least of depriving a person or corporation of its property, and in this case, the property left Pan Am when they mailed out the checks; and I suggest that that was part and parcel of this scheme to defraud.

There is clear evidence in the record that the payments to Tabulated Forms were made by mail. I suggest that the mails were an essential part of the fraud which was perpetrated on Pan American. You may proceed.

MR. FRIEDMAN: I suggest to your Honor that even if your Honor's theory were correct, which I must respectfully disagree with, in this case the evidence is barren of any scheme on the part of Mr. Hasenstab in terms of a demand upon Mr. Barney.

THE COURT: If he made a demand, the government would have charged him with extortion. You don't have to have a demand for bribery. You have to have two willing actors, and that's what you have. Yes, it may well be that at the outset Mr. Barney made a proposal to Mr. Hasenstab, but I suggest the evidence to be clear that Mr. Hasenstab accepted the proposal and thereafter took money apparently in substantial amounts.

Anything further, Counsel?

MR. FRIEDMAN: I don't think that the taking of money, if that be the position that the Court accepts as the fact, I don't think his taking of money where there is no agreement between the parties, "If I give you the money, do I get the business?", that that can sustain the case going to the jury. And while one may draw certain inferences from certain conduct, in this case there is no more than the specific testimony by Mr. Barney that he gave money in appreciation, and that he chose the amount.

THE COURT: Well, if Mr. Hasenstab appreciates, was it, so far as he is concerned, he would have taken the money and turned it over to Pan American and not stuffed it in his own pocket. I suggest to you that his conduct was that of a disloyal employee, as was the case of the defendant in Bryza whose conviction was affirmed by the Seventh Circuit.

Do you have anything else?

MR. FRIEDMAN: I have nothing more to say to your Honor on this issue.

THE COURT: Very well, Mr. Kingham, do you have anything you wish to add?

MR. KINGHAM: I do not, your Honor.

THE COURT: The motion made for judgment of acquittal as to Counts 1, 2 and 3, mail fraud, wire fraud, and conspiracy is denied.

Bring in the jury.

(Pause.)

THE COURT: Please call your first witness.

MR. FRIEDMAN: Mr. Saul Welger.

MR. KINGHAM: Your Honor, if I may, before the jury is brought in, it would be appropriate to address the Court on a matter with regard to Mr. Welger out of the presence of the jury .

THE COURT: All right. Yes, go ahead.

MR. KINGHAM: It may take a few moments.

THE COURT: All right.

MR. KINGHAM: As your Honor knows, the name Saul Welger has come up repeatedly during the direct and cross examination of witnesses in this case.

As I understand it, Mr. Welger is at the present time still an employee of Pan American, and as we know from counsel's representations yesterday, he was furnished with a subpoena duces tecum to come here today.

The government understands that Mr. Welger is in a position where, if he testifies, he may well incriminate himself; and therefore, we would suggest that the Court out of the presence of the jury inquire of counsel as to an offer of proof, number one.

And number two, with Mr. Welger in court, advise him of his Fifth Amendment privilege; and I note, I have been notified, that Mr. Howard Eisenberg, an attorney here in New York, is appearing for and on behalf of Mr. Welger and is present in court.

MR. EISENBERG: May I give my appearance?

THE COURT: Yes.

MR. EISENBERG: Howard Eisenberg, 331 Madison Avenue.

THE COURT: Very well. We will take the matters one at a time, Mr. Eisenberg. I think it is appropriate in view of the situation as it's been explained to me, that we have an offer of proof from Mr. Friedman.

MR. FRIEDMAN: The duces tecum, if your Honor please, requires Mr. Welger to produce records --

THE COURT: Corporate records?

MR. FRIEDMAN: Corporate records, which we believ are in his possession in Rockleigh, New Jersey, and are relevant to this case.

THE COURT: In other words, you do not intend to ask him any questions -- let me be clear on this --

MR. FRIEDMAN: I didn't finish yet.

THE COURT: All right, because I want to be very clear.

MR. FRIEDMAN: Then I intend, after that point, to ask him substantive questions relating to the performance of the duties as an employee of Pan American, and his relationship with Mr. Barney.

THE COURT: Was there any necessity that it be Mr. Welger who produces these corporate records?

MR. FRIEDMAN: I think the records that he actually made and can testify to in terms of the relevance to this case.

MR. KINGHAM: Your Honor, I would suggest that as to the identification of the records, if there are any records which are in fact business records and relevant, we can probably overcome that hurdle either by stipulation or another Pan American witness.

With respect to testimony concerning Mr. Welger's performance of his duties, obviously is an area in which he might have a problem.

THE COURT: Let's start with the first point.

MR. KINGHAM: I don't know what records --

THE COURT: I don't recall if there was a subpoena duces tecum but that would call for him at best to produce Pan American records which are in his custody, so Mr. Eisenberg, let me ask if Mr. Welger has brought with him any Pan American records which are in his possession, custody, or control:

MR. EISENBERG: It is my understanding, from Mr. Welger, that any of those records were previously turned over to the government; that he has no personal records or control over any particular records; that any records that were involved in this matter would have been in the custody of the United States government.

MR. KINGHAM: We of course have made all those records, as I have made abundantly clear, your Honor, available to the defense.

THE COURT: And I gather that you would not contes authenticity so far as those records are concerned?

MR. KINGHAM: Oh, certainly not.

THE COURT: Very well.

So, we are only down to the question of relevance.

It would seem that Mr. Welger would not be needed with reference to authenticating the documents, so that I think we can move past the first point.

If you want to put any documents in evidence, counsel, speaking to Mr. Friedman, you may do so.

If you wish to offer the particular documents at this time, I suggest you tell me that you are in a position to offer them, and then we will get on to the other and more difficult point, which is the point regarding Mr. Welger's giving oral testimony.

MR. FRIEDMAN: I am not in a position to offer those records because they have not been produced, either by the government or by Pan American.

MR. KINGHAM: Your Honor, I call your Honor's attention to my trial cart, which unfortunately is too big to mark as an exhibit. I am pulling a file drawer out of it. In the front of this file drawer are piles of records which say on them, for example, "Data Processing Center, New York." Those are 1973.

And all these records relate to the Data Processing Center in Rockleigh for later years.

Those, together with another batch of documents which are loose and relate to Tab Forms, that is Mr. Barney's invoices, have all been made available to the defense. They have been among the piles of documents made available to the defense consistently for the last two weeks in addition to delivery receipts.

THE COURT: Mr. Friedman, Mr. Kingham has indicated that all of those records to which Mr. Eisenbeg and he have made reference have been made available to you,and I see at the side of the courtroom a file drawer with maybe six inches thick of records.

Do you dispute the point?

MR. FRIEDMAN: I am told, if your Honor please, by the attorney for Pan American, that at some point a certai quantity of records were turned over to the government. I understand informally -- it's not a matter of testimony -- but by my speaking to Mr. Welger he says he has no other records at Rockleigh and he says that someone in the Security Department of Pan Am, a Mr. Cunningham, or I am advised this Mr. Cunningham came into possession of certain records. Those records relate apparently to the duties and business of Mr. Welger in Rockleigh.

We don't find those records here.

THE COURT: They appear from what I have heard so far to be corporate records, and if you have learned that the are in the possession, custody and control of a Mr. Cunningham, rather than the government, I suggest that you should be looking to Mr. Cunningham or to someone else at Pan Am.

MR. FRIEDMAN: I respectfully suggest to your Honor, with the greatest of respect, that considering the fact that Mr. Welger's position, and he is here in the courtroom now as I speak, considering the fact that his position may be somewhat tenuous and he has an attorney representing him here, I don't know if I am obliged to accept his out-of-the-court statement.

THE COURT: I see. You choose not to accept the representation of Mr. Eisenberg on the subject?

MR. FRIEDMAN: Not Mr. Eisenberg's so far as I know. Maybe he can clarify the matter because when I met Mr. Welger the first thing I said to him in front ofthe Pan American attorney was, "You advise him of his rights to a lawyer so as not to take advantage of him," and the attorney from Pan Am advised him of his rights and I don't know whether or not Mr. Eisenberg has any personal knowledge on the subject.

I am only saying that Mr. Welger advised me that he had no records.

THE COURT: What do you propose?

MR. FRIEDMAN: I don't propose anything, Judge. I was calling Mr. Welger and I was going to ask him where are his records.

THE COURT: All right.

MR. FRIEDMAN: Let him state what he has to state in front of the jury.

THE COURT: All right.

Let Mr. Welger take the stand outside the presence of the jury. I will have him sworn, and he can have his counsel present, and he can answer any questions you put to him right here and now.

MR. FRIEDMAN: I think on that issue of the existence or non-existence of the records or his possession of them, I think that that is a matter for the jury to listen to.

THE COURT: I think in the first instance it is a matter for the Court, and I intend to pursue the matter, and after the first instance, I will determine if there is anything of probative value which is left.

MR. FRIEDMAN: All right, sir.

SAUL WELGER, called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FRIEDMAN:

THE COURT: Let the record reflect that Mr. Welger is accompanied by Howard Eisenberg, Attorney, 331 Madison Avenue.

Mr. Welger, it has been brought to my attention that you may be the subject of criminal prosecution, either now or at some future date. I must advise you that under the circumstances you have the right under the Constitution, first, to confer with counsel; and second, if you believe that any answer you may make to any question put to you would tend to incriminate you, to assert the privilege against self-incrimination.

I want the record to be clear, I am not directing you to do this, but I am merely advising you of your rights, so that you are now going to be asked some questions.

You have the right, if you wish, to confer with your counsel who stands beside you, and the right either to answer the questions or if after consideration you believe the answers might tend to incriminate you, to assert the Fifth Amendment privilege against self-incrimination.

You may proceed, Mr. Friedman.

BY MR. FRIEDMAN:

Q Mr. Welger, as an employee of Pan American, have you been performing your duties for the last number of years at a facility known as Rockleigh?

A Yes.

Q And during the course of the time that you have been at Rockleigh, what has been your capacity there?

A Financial analyst.

Q And during the time that you have been there, has your facility requisitioned from your -- through your purchasing office, certain paper supplies and goods from a company known as Tabulating Stock Forms, Inc.?

A Can you repeat that, please?

THE COURT: Mr. Reporter.

(Question read.)

A Yes.

Q During the course of your service as such employee did you as a part of your duties have custody and control of certain records relating to purchases by Pan American from Tabulating Stock Forms, Inc.?

A Yes.

Q And what records did you maintain or keep custody of at that facility?

A The requisition, the purchase order, and the receiving -- the packing slip.

Q The receiving what?

A Packing slip.

THE COURT: Requisition, purchase order and packing slip.

Q Did you keep in your facility -- withdrawn.

Did you maintain some type of a binder or folder?

A Pardon?

Q Some type of a binder or a folder in reference to these transactions?

A Yes.

Q What was that binder or folder called?

A It was requisitions.

Q When you say requisitions, were those the original requisitions by your department to the Purchasing Department?

A Yes.

Q Were those requisitions kept in some type of booklet or envelope or folder?

A A binder.

Q A binder.

Was it a looseleaf binder?

A Yes.

Q Do you have that binder today?

A No.

Q Do you know where it is?

A It was subpoenaed by the federal government.

Q Did you give that binder to somebody?

A We didn't give them the binder. We took everything out of the binder.

Q And what did you do with what you took out of the binder?

A We sent it over to our Security Department.

Q And when you say Security Department, where is that?

A Pan Am Building.

Q And do you of your own knowledge know who received those documents?

A No.

THE COURT: Were the documents corporate records or were they individual records of you personally?

THE WITNESS: No, they were corporate records.

Q Did these corporate records that you had there have a certain color to them? Were they colored, the paper colored?

THE COURT: White, grey, yellow?

A Yes, some of them were, yes.

Q Do you remember the colors of the paper?

A White, yellow.

Q Do you know who in your Security office actually received those papers?

A We sent them over to Mr. Guarnieri.

Q That's all you know about them?

A That's all I know.

MR. FRIEDMAN: I am in a position, Judge, which is why I think you called this witness -- I have no other questions.

THE COURT: You may inquire.

(Continued on the next page.)

T4 pm

MR. KINGHAM: Your Honor, may I have these marked as Government Exhibit 20. It is a number we won't use for any other reason.

THE COURT: 20 for identification.

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(Government Exhibit 20 marked for identification.)

CROSS-EXAMINATION

BY MR. KINGHAM:

Q Mr. Welger, my name is Barry Kingham, sir. I am the prosecutor in this case and I represent the government.

I am going to show you a stack of documents which are collectively referred to as Government Exhibits 20 for identification.

Would you be good enough to look at those and tell us if those are not the contents of the binder to which you have referred in answering Mr. Friedman's questions.

A Yes.

Q They are, sir?

A Yes.

MR. KINGHAM: Nothing further, your Honor.

THE COURT: Very well.

MR. FRIEDMAN: I have nothing further on this issue, your Honor.

THE COURT: Very well.

MR. KINGHAM: I point out, your Honor, that these of course are the records to which I indicated earlier that have been available to counsel for two weeks.

THE COURT: I noted that you took them from the same place. In any event, they have now been clearly identified by the witness.

I believe that would include the first of the two matters, which was the duces tecum part of the subpoena.

We will now proceed to the second matter for anything else which Mr. Friedman wishes to pursue.

MR. FRIEDMAN: I make the representation, Judge, that by not being aware of the nature of the records as being the ones that Mr. Welger kept, that if I proceeded further before a jury or here I would ask him questions relative to the preparation of those records, his handwriting, his relationship to Mr. Barney as they might relate to some of these records. I think that is what your Honor wanted.

THE COURT: Yes.

MR. FRIEDMAN: That would be the nature of what I would do.

THE COURT: Mr. Eisenberg, you have heard the offer of proof and perhaps you can have a moment to confer with your client and if he is prepared to answer the questions or some of them, I would at this point bring in the jury and have him resworn.

If his position would be that he would answer no questions in any area, asserting in each area the privilege against self-incrimination, I suggest that that be done outside of the presence of the jury unless, Mr. Kingham, you feel that the jury should be brought in for this purpose.

MR. KINGHAM: I do not, your Honor.

THE COURT: Mr. Friedman, are you prepared to proceed in the manner I have indicated or do you want to proceed in some other fashion?

MR. FRIEDMAN: It would be my preference to put the questions to the witness in the presence of the jury.

MR. KINGHAM: Your Honor, it is my feeling that there are some at least seeming ethical problems with that, calling a witness to testify in front of a jury knowing that he intends to assert the Fifth Amendment.

THE COURT: Let's first find the predicate. Let's find out what his position is.

Do you know the areas to which counsel refers?

MR. EISENBERG: I understand but your Honor, if I may, the witness is appearing here pursuant to a

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subpoena duces tecum, of which the exact language is, all records of Pan American World Airways relating to all transactions by Pan American with Tabulating Forms, Incorporated, indicating requisition and purchase order files, invoices and receiving reports.

In relation to those items, the witness is willing to testify either in the presence of the jury or outside the presence of the jury.

I don't believe that, and his testimony would be in furtherance of the subpoena and to substantiate the records and the transactions which would be reflected by the documents.

THE COURT: What you are saying is that he is prepared to answer at least certain of the questions within the areas which were covered by counsel. Let's get to the most sensitive area that I heard.

There was something about his dealings or transactions with Mr. Barney.

MR. EISENBERG: In relation to records and documentation which exists as to whether requisitions went to who and to the parties and the chain of events that took place in the corporation, the witness would be willing to testify as to the actual transactions that are reflected by the invoices and the records, all right, and that is the purpose for which he is here under subpoena.

In relation to any other questions regarding, any other matters extraneous to that situation, I believe that I would oppose such questions based upon them being outside the subpoena and not relative to the issues specifically involved regarding the records because it appears -- that's my position, your Honor.

THE COURT: Well, if that is your position, I think I would have to indicate to you that since the witness is physically here, he could be asked questions by counsel on all matters which are relevant to the subject matter of this trial and I would suggest that Mr. Friedman has indicated an intention to ask him some questions regarding his transactions with Mr. Barney, is that correct, Mr. Friedman?

MR. FRIEDMAN: That's correct, your Honor.

THE COURT: And in that regard, just so you have the background of it, Mr. Barney has testified to certai matters involving credit cards and automobiles. He has testified in this courtroom before this jury.

I would assume for his own purposes counsel would wish to ask the questions along the same line as was covered during the government's direct case. Mr. Kingham might well object but I suggest that in a proceeding such as this, I could very well be disposed to allowing certain of the questions as relevant so, assuming the questions would be asked regarding, for example, credit cards, automobiles and other transactions with George Barney, perhaps we can find out from your client-- that is from you after conferring with your client -- what your client's position would be on questions in that area.

MR. EISENBERG: I have discussed that matter with my client and since he has not been a party to any of the testimony that has preceded, since he doesn't know the full extent of that testimony, we have discussed his taking the Fifth Amendment in relation to annything other than the items for which he has been subpoenaed here which involve corporate records and the documents pertainin thereto.

THE COURT: All right. That is your position.

Mr. Friedman, I will leave it to your ethical discretion and judgment. You have been advised by counsel that there are certain areas where this witness is prepared to answer all your questions and there are at least one or two areas which I think you would intend to go into where he intends to assert the privilege against self-incrimination.

I will not, at this point, prejudge your examination. I will not bar you from doing anything. I suggest that you must operate first within the bounds of what is properly relevant here and I will try to be liberal in that but, secondly, within the bounds of what you believe ethics dictate.

If you want any more specification from either the witness or his attorney with regard to the areas where the Fifth Amendment privilege is anticipated, you may wish to put specific questions to the witness. Alternatively, if you choose, you may rely upon counsel's statements as he has just set them forth on the record.

MR. FRIEDMAN: May I respectfully suggest to your Honor that I am fully aware of the rights of Mr. Welger and I do not have any desire to proceed in any fashion which might be characterized as being unethical and knowing Mr. Welger's position at this moment, quite frankly, I think your Honor can well understand that the nature of the questions relating to matters which are outside of the specifics of the documents concerned do relate to the documents and the transactions, motivation and so on and they cannot truly be served.

Now, when I spoke to Mr. Welger, who was under subpoena, prior to his taking the stand in an effort to be ethical, I advised him that he should have an attorney and I did this in the presence of the corporation attorney who by reason of ethics explained to Mr. Welger that he, too, had a problem, since he represents Pan Am and there may be a conflict of interest.

We suggested that Mr. Welger could do as he chose but that we could only say ethically that he had better speak to a lawyer and receive independent advice and I did explain to Mr. Welger that certain questions may be put to him concerning his conduct upon which someone may raise a question as to the propriety thereof and so that finds us here.

Now, I am very frank to say to your Honor that it would be my preference to put the questions I have in mind concerning Mr. Welger's conduct to Mr. Welger in the presence of the jury. However, I don't know the ethical ramifications of that and I don't want to do anything which in any way might br criticized as being inappropriate as a member of the bar of this court.

I would like to look for guidance to your Honor but I don't know whether or not I can. Your Honor knows that if the witness is called before the jury, there will be certain questions put to him which I would assume would very shortly result in the invocation by

Mr. Welger of his rights and I am frank to say, your Honor having quite properly alerted me to, and Mr. Kingham told me about ethical consideration, I am at a loss to know but I do not know of any so-called ethical rule governing the subject matter and perhaps your Honor on this tender issue in these days when lawyers and judges, prosecutors and everybody in the system is criticized because we are what we are, criticized by reason of the manner in which they say we do our jobs, maybe your Honor has some feeling on the matter which your Honor can convey and perhaps after your Honor has addressed himself to this issue I could be able to more properly make a decision.

THE COURT: Since Mr. Kingham raised the point, we will hear from him and then I would make one or two comments.

MR. KINGHAM: Your Honor, although I haven't got the books here, it is my understanding that at least insofar as the ABA standards are concerned, that there may be a possible ethical problem by calling a witness before a jury knowing that that witness intends to invoke his privilege.

In a case such as this it creates several problems. Not only because it could be used against

Mr. Welger in some fashion but also because it raises an inference that because the witness is taking, is invoking a right that he is perfectly entitled to invoke in front of the jury that somehow that witness must be guilty and the defendant not and I suggest that that in itself is confusing to a jury and regardless of what curative instructions the court could give would create serious difficulties and prejudice to the government's case.

With respect to documents, obviously, we will stipulate that those documents are what they purport to be but I suggest that any questions that I might put to Mr. Welger by way of cross-examination both as to his relationship with Mr. Barney and as to his processing of documents in any form would probably result in his invocation of the Fifth Amendment privilege on cross-examination.

I frankly don't want to put the government in the position of cross-examining a witness whom it knows is going to invoke his Fifth Amendment privilege and should on the advice of Mr. Eisenberg.

So the government finds itself in almost a double quandary here and we are perfectly happy to stipulate to ease the way for documents, assuming they are relevant, but as to Mr. Welger's testimony, frankly, we would oppose it on the ground that other than identifying documents, his testimony and his eventual invocation of the Fifth privilege is unduly prejudicial to the government's case.

MR. FRIEDMAN: Before your Honor comments, if I may, I would like to say this: I find myself with great frankness somewhat at a loss to understand the government's expressed position on this issue because I happened to be reading the grand jury minutes of my client's testimony and when I had the discussion with the government about the government compelling my client to come before the grand jury in the presentation of this case and the government knew that my client would invoke his rights, my client was compelled to come here and he did invoke his rights and he was compelled to invoke them in front of the grand jury and then, as a curative instruction before the grand jury, Mr. Wing, I believe, who presented the case or whoever the Assistant was, then gave a one paragraph admonition to the grand jurors that they were to take no inference from the invocation of the rights.

I think there should be consistency in the government's position. Whether there has been or not or whether that will result from this case is another matter but I have the problem of not being able to question from a document as it relates to Tabulating Forms, Inc., or Mr. Barney, without of course knowing that at that point somewhere Mr. Welger would undoubtedly, maybe properly so, invoke his rights because as soon as I start to talk about, in my questioning, Tabulating Forms, Inc., that might very well give the witness thought about invoking his rights. Certainly when I reach the subject of knowledge of Mr. Barney as it affects these audits, he undoubtedly would and that leaves us back with the considerations.

MR. EISENBERG: Your Honor, I have further points here.

The subpoena itself only concerns itself with records regarding transactions and that was the sole purpose that Mr. Welger appeared today. There is no indication in the subpoena that he was to give testimony other than regarding the records relating to transactions.

THE COURT: On which subject you say he is prepared to testify fully.

MR. EISENBERG: Yes. But I think that anything extraneous or going behind the transactions or in everything extraneous to the transactions are not relative to the subpoena and are outside the scope of the subpoena and, in addition, place Mr. Welger in a position where he would be advised and has been advised that he should take the privilege against self-incrimination. However, that may create some problems with him in relation to his own firm, by which he's been employed since 1954 which is another consideration we have here. The subpoena gives him no notice that there is any intent to bring in anything other than Mr. Welger to verify these records and transactions and I believe to permit any testimony extraneous to that exceeds the bounds of the subpoena and I am moving that the witness not be required to even answer or take the Fifth Amendment or do anything other than what the purpose of the subpoena is, which specifically pertains to records relating to transactions. The records relatating to the transactions are in the court, present and identified as Government Exhibit 20.

There is no indication from defense counsel that these records are not acceptable or that there is anything wrong with the records or he is contesting the records in any way.

So it does not appear that Mr. Welger's testimony is intending to be involved with the very purpose in which the subpoena is issued. To verify the records themselves and I think that any other testimony is extraneous and outside the purpose and the demand from the subpoena and is improper in relation to this witness and also jeapardizes and affects him in that his invocation of his rights may create some problem with him in relation to his firm.

He is not a defendant on trial here. There is no charge pending against Mr. Welger.

MR. FRIEDMAN: May the record reflect, I think we ought to have the subpoena or a copy marked because the language has been alluded to by counsel and I don't think the record reflects that the subpoena is the standard form issued by this court which in reference to this case reads, directed to Mr. Welger, "You are hereby demanded to appear in the United States District Court for the Southern District of New York, Foley Square, in the City of New York on the 25th dya of August, 1977, at 9:30 o'clock A.M. to testify in the above case and bring with you all records of Pan American World Airways relating to all transactions by Pan American with Tabulating Forms, Inc. indicating requisition and purchase order files, invoices and received reports"--

THE COURT: I have indicated already to Mr. Eisenberg that I don't regard that particular objection as one which I could fairly sustain as a matter of substance.

Mr. Welger is here and he should be expected to give evidence on all matters relevant to these proceedings.

That gets to the point that's in my mind and I will put it to you this way but giving you my thoughts on the ethics of the matter.

MR. EISENBERG: Your Honor, may I submit the actual subpoena in evidence?

THE COURT: Yes.

MR. EISENBERG: So that we will--

THE COURT: Has it been read correctly?

MR. EISENBERG: Not fully and I think it should be, since it is being alluded to.

THE COURT: It will be the next Court's exhibit.

We will make the original subpoena the next Court's exhibit.

(Court's Exhibit 6 marked.)

THE COURT: All right. Number 1, I have a reservation in my mind, Mr. Friedman, as to the relevance of the line of inquiry which you intend to make insofar as it relates to this witness to the issues which are here on trial. The relevant issues here, it seems to me, include the transactions between Mr. Hasenstab and Mr. Barney. The fact that Mr. Barney may have corrupted other people as well seems to me to be relevant as to Mr.

Barney's credibility. There is a doctrine that you don't go beyond answers and attack credibility by collatera- proof.

Second, you are calling this witness as a defense witness. I think you have to think about that matter with regard to two problems. Number 1, how the jury views your case, since you have called this particular witness and, number 2, I don't know whether you have made up your mind or not and I am saying this outside of the presence of the jury -- I don't know whether Mr. Hasenstab intends to take the stand but I suggest to you that if this witness who worked with him is called by you and takes the Fifth and your client chooses, as is his right, not to take the stand, and I will give him a proper instruction, so far as that is concerned, this particular tactic may have an undermining effect.

It may be forcing you as a practical matter into putting your client on the stand. You may have already decided to do so but I suggest to you that if this witness testifies and I let him be asked questions on certain areas where he will probably take the Fifth, it may well be that this will have a boomerang effect on you and your defense from a practical point of view.

So, I am going to suggest this:

I overrule the somewhat technical objection of Mr. Eisenberg that the subpoena which brought his client here does not require him to be present for all purposes and all questions and I suggest that I am going to consider that he is here to answer all relevant questions.

I will let you put any question you wish to the witness with the view in mind, from your point of view, that the question is relevant to the issues here on trial.

At that point, we will await an answer and if none is forthcoming, then we will deal with the matter as appropriate.

On the other hand, if there is an objection to the question on proper grounds, such as relevance and I do not find the question relevant to the issues here, then of course I would sustain the objection and we would never reach the first point.

So, what I am doing is simply this: I am going to bring in the jury. I am going to permit you to ask any questions you believe are relevant to the issues here on trial, period.

Mr. Clerk, please bring in the jury.

5 p.m.

(In open court - jury present.)

THE COURT: Ladies and gentlemen, I wish to apologize. When you left I said there would be a ten-minute recess. The recess has stretched beyond that time. We were here taking up legal matters, which are not of concern to you. Therefore, it was necessary that you wait until those proceedings had been completed.

We are going to proceed now with the defendant's case. You will recall that just before the recess Mr. Kingham announced that the government had completed the presentation of its evidence. We are now going to proceed with the defedant's case.

Mr. Friedman?

MR. FRIEDMAN: Thank you, your Honor.

THE COURT: Call your first witness.

MR. FRIEDMAN: Mr. Saul Welger.

THE COURT: Mr. Welger, would you stand and raise your right hand, please.

SAUL WELGER, called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

THE COURT: You may proceed, Mr. Friedman.

DIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Mr. Welger, you know my name is Mr . Friedman, do you not?

A Yes.

Q And you were introduced to me today, is that correct?

A Yes.

Q Where do you live, sir?

THE COURT: Excuse me. Would you please keep your voice up?

A Brooklyn, New York.

Q And you are here today pursuant to the service of a subpoena upon you, is that right?

A Yes.

Q You know this gentleman to whom I am pointing here; do you know who he is?

A Just --

Q Indicating Mr. Kingham.

A Yes.

Q And the gentleman to your right, sir?

A Yes.

Q Do you know him, sir?

A Yes.

Q Who is that gentleman?

A He is my attorney.

Q And his name?

A Mr. Eisenberg.

MR. EISENBERG: May I identify myself? Howard Eisenberg, 331 Madison Avenue.

THE COURT: Mr. Eisenberg, you are an attorney duly admitted to practice in this State and for this court, is that right?

MR. EISENBERG: Yes,sir.

THE COURT: Very well.

Q Mr. Welger, I show you these documents and ask you --

THE COURT: Which have been marked?

MR. FRIEDMAN: As 20 for identification.

THE COURT: Would you want to use a letter?

MR. FRIEDMAN: I think I would prefer that, Judge.

THE COURT: They will now become Defendant's Exhibit L for identification, instead of Government's 20 for identification. Those documents will be Defendant's L for identification.

Q Will you look at these documents, sir, and will you tell me if you can identify them?

A Yes.

Q Have you up until today and including today, been employed by Pan American Airways?

A Yes.

Q At its facility in Rockleigh, New Jersey?

A Yes.

Q And are those records which you kept in the course of your duties as such employee of Pan American?

A Yes.

Q And do those records relate to transactions of Pan American with a company known as Tabulating Stock Forms, Inc.?

A Yes.

Q Do you know a Mr. George Barney?

A Yes.

Q How long a period of time haveyou known Mr. George Barney?

A About eight or nine years.

Q And during the course of the time that you have known him, you of course have spoken to him; is that right?

A Yes.

Q Have your conversations from time to time concerne some of the contents of this exhibit for identification, Defendant's Exhibit L?

A Yes.

MR. FRIEDMAN: I offer these, L for identification, in evidence, Judge.

MR. KINGHAM: I have no objection, your Honor. In addition, the government will stipulate that these are requisitions and copies of purchase orders and what look like shipping documents which were made and maintained in the regular course of business of Pan American Airways at the Rockleigh Data Processing Center, and also at the New York Data Processing Center, relating to the years 1973 through 1976 as they relate to Tabulating Stock Forms, Inc.

That's it.

MR. FRIEDMAN: Thank you for that stipulation.

THE COURT: Very well, the exhibit previously marked for identification is received.

(Defendant's Exhibit L was received in evidence.)

Q During the course of time that you have known Mr. Barney, did there come a time, and I specifically refer to the year 1975, when Mr. Barney gave you a Cadillac automobile?

MR. EISENBERG: Objection.

THE COURT: Do you wish to assert a certain claim, sir?

THE WITNESS: Yes.

THE COURT: Very well.

Do you wish to have your attorney do it for you?

THE WITNESS: Yes.

MR. EISENBERG: The client claims his privilege against self-incrimination.

THE COURT: Do you adopt that statement of your attorney that you claim your right to remain silent under the privilege accorded you under the Fifth Amendment of the Constitution?

THE WITNESS: Yes.

THE COURT: Very well.

Q During the year 1976, Mr. Welger, in reference to these exhibits, Defendant's Exhibit L in evidence, did Mr. Barney give you anything of value in reference to any one of the transactions which are represented by these documents as they relate to the year 1976?

MR. KINGHAM: Objection to form and relevance, your Honor.

THE COURT: Yes, I will sustain an objection on a form basis at this point.

Q During the course of the years that you know Mr. Barney, has Mr. Barney given you things of value in order to influence you in reference to the performance of your duties as an employee of Pan American Airways?

MR. KINGHAM: Same objection, your Honor.

THE COURT: Sustained as to form.

Q In 1975, did Mr. Barney give you the use of certain credit cards?

MR. EISENBERG: The client claims the privilege against self-incrimination.

THE COURT: Do you adopt that statement of your attorney?

THE WITNESS: Yes.

THE COURT: Very well.

Q In reference to 1974, did Mr. Barney give you an automobile?

MR. EISENBERG: The client claims his privilege against self-incrimination.

THE COURT: Do you adopt the statement of your lawyer?

THE WITNESS: Yes.

Q In 1973, did Mr. Barney give you any money or any property of any value?

MR. EISENBERG: The client claims privilege against self-incrimination.

THE COURT: Do you again adopt the statement of your attorney?

THE WITNESS: Yes.

THE COURT: Very well.

Q In 1972 and in 1973, did Mr. Barney give you anything of value?

MR. EISENBERG: The client claims privilege against self-incrimination.

THE COURT: Do you adopt the statement of your attorney?

THE WITNESS: Yes.

THE COURT: Very well.

Q In reference to these documents, which are marked in evidence, sir, didyou ever in return for something of value for -- I will rephrase it.

In reference to these documents, sir, do they represent records of transactions had with Tabulating Stock Forms, Inc.?

A Could you repeat the question.

THE COURT: Yes. Would you repeat the question, Mr. Reporter?

(Question read.)

THE COURT: Indicating the pile of exhibits which are now Defendant's Exhibit L in evidence.

A Yes.

Q In reference to those transactions, sir, did Mr. Barney give you something of value for the purpose of recommending Tabulating Forms, Inc. as a vendor to Pan American?

MR. KINGHAM: Same objection to form, your Honor.

THE COURT: I will overrule the objection.

MR. EISENBERG: The client claims privilege against self-incrimination.

THE COURT: Very well.

Do you adopt the statement of your attorney?

THE WITNESS: Yes.

THE COURT: Very well.

The witness has asserted his Fifth Amendment privilge.

You may proceed, Counsel.

Q Did you in fact, over the years,recommend Tabulating Stock Forms, Inc. as a vendor to Pan American?

MR. EISENBERG: The client claims privilege against self-incrimination.

THE COURT: Do you adopt the statement of your attorney?

THE WITNESS : Yes.

THE COURT: Very well.

Q If I were to ask you like questions, Mr. Welger, concerning your performance of your duties and any relationship that you might have had with Mr. Barney relating to his company's transactions with Pan American, would your answer be the same; that is, would you invoke the Fifth Amendment privilege?

MR. EISENBERG: The client will invoke the Fifth Amendment privilege.

THE COURT: Very well. You adopt the statement of your attorney?

THE WITNESS: Yes.

THE COURT: The witness has indicated that on that line of inquiry, he would assert his Fifth Amendment privilege against self-incrimination.

Q Can you tell me, sir, didyou ever receive a television set or have it paid for by Mr. Barney?

MR. KINGHAM: Objection, your Honor, that's been asked and answered.

THE COURT: I thought you had covered it.

MR. FRIEDMAN: I withdraw the question, specific question. I understand the point of the objection.

I have no other questions of the witness in view of his responses.

CROSS EXAMINATION

BY MR. KINGHAM:

Q Mr. Welger, we just met a few minutes ago, did we not?

A Yes.

Q We had never met prior to that time that you recall?

A Right.

Q Mr. Welger, I believe you have identified what is Defendant's Exhibit L as documents relating to transactions with Tabulating Stock Forms, is that correct, sir?

A Yes.

Q And these documents came from a binder which was kept in your office at the computer facility, is that correct, sir?

A Yes.

Q And the computer facility is presently located in Rockleigh, New Jersey, is it not?

A Yes.

Q And prior to 1974, that facility was in thePan American Building here at Grand Central, was it not?

A Yes.

Q Do you know William Hasenstab?

A Yes.

Q Is that Mr. Hasenstab seated at the defense table?

A Yes.

Q How long have you known Mr. Hasenstab?

A About eight or nine years.

Q And have you known him as a supervisor in the purchasing section at Pan American?

A Yes.

Q And presently -- or not present, but at least for the last few years, his office has been out at JFK Airport, isn't that correct?

A Yes.

Q With respect to the requisition form, that is, the white copies, of the documents in Defendant's Exhibit L in evidence, Mr. Welger, the requisition forms are the means by which the using department asks the Purchasing Department to order something; is that not correct?

A Yes.

Q And you have become familiar during your employment in the Data Systems Management section with the use of those requisitions, have you not?

A Yes.

Q And indeed, you have proceeded many, many of them, haven't you?

A Yes.

Q And in preparing the requisition forms that are now in evidence, in your experience, the requisition form is prepared at your facility, is it not?

A Yes.

Q And is then sent to the Purchasing Department, is it not?

A Yes.

Q With respect to the requisitions on commodities furnished by Tabulating Stock Forms, we are talking about requisitions usually for computer paper, are we not?

A Yes.

Q I believe you testified before that you knew Mr. Barney, is that right?

A Yes.

Q And he was the man who would sell the computer paper for Tabulating Stock Forms to Pan American, isn't that correct?

A Yes.

Q When you as the user of computer paper desired more computer paper, would you not send a requisition to Mr. Hasenstab?

A Yes.

Q Now, sir, do you recall in your years at Pan Am a man by the name of Jerry Long?

A Yes.

Q And who is Mr. Long?

A He had -- the job that I have he had before me.

I replaced him.

Q When was it that you replaced him as the senior financial analyst?

A Well, it was a lower grade then, but --

Q In that job, when was it?

A Yes, in that job, the end of '68. He left the company.

Q I'm sorry, sir?

A He left the company

Q So in the end of '68 --

A Right.

Q -- you became the man responsible for ordering the computer paper; is that right?

A Yes.

Q And beginning in the end of '68, was it not Mr. Hasenstab with whom you dealt in submitting the requisitions for computer paper to the Purchasing Department?

A Yes.

Q How long did that continue?

A Up until now.

Q Until Mr. Hasenstab left the company?

A Yes.

Q And was it primarily Mr. Hasenstab with whom you would deal in the Purchasing Department?

MR. FRIEDMAN: I object to the form of that question.

THE COURT: Yes, change the form.

MR. KINGHAM: I will rephrase it, your Honor. In fact, I will withdraw the question.

Q In connection with requisitions, Mr. Welger, was i your responsibility to obtain price quotations from the vendor?

A No.

Q Whose responsibility was that, if you know?

A The Purchasing Department.

Q And in your experience with the orders for computer paper, who would obtain those price quotations, if you know?

A I don't know.

Q And is it your testimony, sir, that you did not, as a practice, obtain quotations?

MR. FRIEDMAN: I object to that.

MR. KINGHAM: It's cross examination.

MR. FRIEDMAN: The form of the question.

THE COURT: What is that?

MR. FRIEDMAN: That is new matter and I object to the form.

THE COURT: If it is new matter, then I would overrule it. If there is a form objection, you better state it.

MR. FRIEDMAN: The form of the question related to practice. There has been no --

THE COURT: He is entitled. Let's go back and see if there was a practice. I think there is certainly a validity to the objection which would require you to make a predicate inquiry.

MR. KINGHAM: I will.

Q With respect to the obtaining of price quotations, was there a practice at Pan American as to who was to obtain the price quotations?

A It was the Purchasing Department.

Q Do you recall, sir, in your capacity as a senior financial analyst, ever having obtained price quotations from a vendor?

A None. I --

Q I can't hear you.

A I don't recall any.

Q Not that you recall, is that correct?

A Right.

Q As the using department, you would receive a copy of the purchase order after the order had been completed, would you not?

A Can you --

Q I will put it again so you can understand it. As the using department, that is, the person who is going to use the paper, after the purchase order was completed by the purchasing section, your department would receive the purchas order back again,would you not?

A Yes, a copy.

Q A copy, I'm sorry.

And indeed attached to all of the requisitions in Defendant's Exhibit L is a copy of the purchase order that matches up with that requisition?

A Right.

Q Is it not correct, Mr. Welger, that on the purchase orders that you would receive, the price was stated on the purchase order?

A Yes.

Q In your experience?

A Yes.

MR. KINGHAM: May I have a moment, your Honor?

THE COURT: Yes.

(Pause.)

T6

Q Mr. Welger, let me call your attention to the year 1975.

Are you familiar, sir, with something called the stock Tab contract or the annual contract for computer paper deliveries to the Rockleigh facility?

A Could you repeat that, please.

(Record read)

A Yes.

Q Is it not correct, sir, that for the year 1975, the vendor for that order was Moore Business Forms?

A Yes.

Q Is it not also correct that subsequent to the beginning of 1975, Mr. Barney's company, Tabulating Forms, got a piece of that order?

A What was the time?

Q After the beginning of '75.

A Yes.

THE COURT: Perhaps in the spring.

THE WITNESS: Yes, right.

Q Is that correct, sir?

A Ys.

Q And did there come a time when that contract was extended into the year 1976?

A Yes.

Q And is it not also correct that by way of the extension for 1976, Mr. Barney's company received the entire contract?

A Yes.

Q If you recall.

A Yes.

Q Did you, Mr. Welger, obtain the prices from Mr. Barney in connection with the extension of the contract for 1976?

A No.

Q Do you know, sir, when it was that the extension for 1976 was arranged?

A I think --can I say something, Judge?

THE COURT: You have to answer the question, if you know.

Q Answer the question yes or no, if you can.

A No, I don't know.

Q You can't answer it?

A No.

Q Is it not true that in your experience with Pan American,annual contracts of that sort are renegotiated at the end of the prior year?

MR. FRIEDMAN: I object to that. There has been no testimony throughout this case of any such other annual contractor, sir.

THE COURT: Do you know of any other annual contracts that Pan American had?

THE WITNESS:Well, I don't know what you mean by an annual contract in that --

THE COURT: Perhaps you can rephrase the question.

Q With respect to the stock paper computer contract, am I correct that that contract was in existence even before 1974?

A Yes. Every year--

Q It was an annual thing, an annual contract, wasn't it?

A Yes, sir.

Q And isn't it correct that at the end of each year, the contract would be renegotiated for the following year?

A Yes. In about October of that year for the following year.

Q For the following year, is that correct?

A Yes.

Q Were you at work, sir, at the Rockleigh facility in October of 1975?

A No.

Q Where were you?

A In the hospital.

Q Where were you in the hospital?

A Florida.

Q For how long a period of time?

A About a month. Three weeks to a month.

Q And during what time was that, sir?

A From the middle of September until the middle of October.

Q And did you thereafter return to your home in Brooklyn?

A Yes, sir.

Q And when was that, sir?

A About the middle of October.

Q When did you return to work at the Rockleigh facility?

A Some time in December.

Q Some time in December of '75?

A Yes.

MR. KINGHAM: No further questions.

REDIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Mr. Welger, in fact, you had given Mr. Barney the prices that Moore Paper Company was being paid by reason of its delivery of such goods under its annual contract, isn't that true?

A I don't recall.

Q You don't recall?

As a matter of fact, Mr. Barney gave you, in 1975, an automobile in appreciation of your giving him certain price information, isn't that true?

MR. KINGHAM: I object, your Honor. This is improper redirect examination.

THE COURT: No. I am going to overrule your objection.

MR. EISENBERG: My client claims the Fifth Amendment privilege against self-incrimination.

THE COURT: You adopt your attorney's statement about this particular matter?

THE WITNESS: Yes.

THE COURT: Very well. The witness has asserted his Fifth Amendment privilege on the subject of the automobile.

Q Mr. Welger, isn't it true that you, on a number of occasions, on your requisitions to the purchasing officer in reference to Tabulating Stock Forms, Inc., indicated on the requisition the price for the goods?

MR. EISENBERG: My client claims the privilege against self-incriminatinon.

THE COURT: I want you to consider that one, counselor, with regard to the document opening the door.

MR. FRIEDMAN: Excuse me, Judge.

THE COURT: I am speaking to Mr. Eisenberg. He has given certain advice. I just want him to consider it for a moment and then if he wishes to adhere to it, of course he may.

MR. FRIEDMAN: May I, with all due respect to your Honor --

MR. KINGHAM: If this is to be done, let's do it at the side bar,please.

THE COURT: Yes, at the side bar, fine. And I speak, when I say opening the door, of prior testimony given by the witness, not you.

Let's step to the side bar.

(At the side bar)

MR. FRIEDMAN: Judge, I know that you don't intend to convey any meaning to the jury but I could conceive of your Honor's comments conveying some impression to the jury and I felt that it might be harmful to the defendant and I meant that out of the greatest respect.

THE COURT: Well, I indicated, as you know, before we stepped to the side bar, that I was addressing my comments to Mr. Eisenberg which in fact i was, since

I was looking right at him at the time and he is the one who had given the advice.

If you wish me to give any further instruction to the jury, I am prepared to do so because it was not directed to you and I was looking at Mr. Eisenberg, talking to Mr. Eisenberg, and of course I made the comment before we came to the side bar.

MR. FRIEDMAN: I understand that and I meant by suggesting to your Honor now in the side bar conference though unintended by your Honor, I think that comment to Mr. Eisenberg in the presence of the jury might be somewhat harmful to the defendant and I --

THE COURT: I was trying to assist in your examination.

MR. FRIEDMAN: I know Judge, but --

THE COURT: If you want me to make any statement to the jury, I will be happy to do it because I was trying to help you.

MR. FRIEDMAN: I appreciate that, Judge.

MR. EISENBERG: Your Honor, if I may--

THE COURT: Let me hear first from Mr. Friedman, because if he wants anything, I will give it to him.

MR. FRIEDMAN: At this point I don't think the matter should be emphasized with the jury one way or the other and let's let it pass by without a comment from counsel or the court in clarification.

MR. EISENBERG: Since I have just returned and I am not familiar at all with the practice involved here in relation to the pricing, I am not sure whether this is a matter outside of the ordinary course of his activities or not and that's the problem that I have-- the relation to the records, whether they reflect his normal course of activities or whether the questions that are being asked represent alleged or inferred activities outside of his prescribed activities. I am therefore at a loss to make that --

THE COURT: If you want to have a moment to step outside of the courtroom with your client and just check that out, fine; that would be agreeable to the court.

MR. EISENBERG: Very good.

THE COURT: All right. Why don't you do that at this time.

(In the presence of the jury)

THE COURT: Ladies and gentlemen, there will just be a very brief recess. We have had a side bar meeting and Mr. Eisenberg and his client are going to confer briefly outside the courtroom. Just bear with us, please.

(Mr. Eisenberg and the witness left the courtroom and, after a short time, returned.)

THE COURT: I note that Mr. Eisenberg has returned. We are back at the side bar.

(At the side bar)

MR. EISENBERG: At this point I am prepared to withdraw the client's objection since I now understand the circumstances regarding pricing, et cetera, and he is free to answer the question.

THE COURT: Before we leave the side bar, in view of that, do you wish me to make a statement to the jury?

MR. FRIEDMAN: No.

(In the presence of the jury.)

THE WITNESS: May I hear the question?

THE COURT: Mr. Reporter?

(Pending question read)

A No.

Q Did someone in your department, to your knowledge?

A Not to my knowledge, no.

Q Isn't it true, sir, that you had a number of discussions with Mr. Barney concerning a blanket purchase order in reference to the stock Tab order which in 1975 was being furnished by Moore Business Forms?

A Can you repeat the question, please?

(Record read)

MR. FRIEDMAN: It is confusing, maybe I will withdraw it.

THE COURT: Go ahead, withdraw it and rephrase it.

Q In reference to the goods called stock Tab forms -- that is an expression you are familiar with, is that right?

A Yes.

Q Well, it is descriptive of a certain type of goods?

A Yes.

Q At a certain time in 1975, was Moore Paper supplying Pan Am with those forms?

A Yes.

Q Isn't it a fact that there came a time when you had a discussion with Mr. Barney about his company taking over that order?

A No.

Q You are sure?

A To the best of my knowledge, no.

Q Before 1975, you had recommended Mr. Barney's company as a vendor of certain supplies to Pan American, isn't that true, sir?

A Can I hear that again?

(Question read)

MR. KINGHAM: I object. I think that's asked and answered. On direct examination, as a matter of fact.

MR. FRIEDMAN: I think he invoked the rights in some aspects of that question.

THE COURT: I will suggest this: I am going to overrule the objection.

MR. EISENBERG: The client claims his privilege against self-incrimination.

THE WITNESS: I would like to answer this.

THE COURT: He says he would like to answer it.

MR. FRIEDMAN: Happy to hear it.

THE COURT: He has counsel and he would like to answer the question.

Do you wish it answered?

MR. FRIEDMAN: Yes.

THE WITNESS: Can you repeat the question once more?

THE COURT: Of course. Mr. Reporter, would you please repeat the question.

(Record read)

MR. EISENBERG: Your Honor, at this time, may I confer with my client?

THE COURT: Of course. Do you wish to do it outside the presence of the jury.

MR. EISENBERG: Yes. Only be a moment.

THE COURT: Of course.

(Mr. Eisenberg and the witness left the courtroom and, after a short time, returned.)

MR. EISENBERG: Thank you, your Honor.

THE COURT: Mr. Reporter, would you read the last question?

(Record read)

A No. He had been doing business from the mid-'60s with Pan American.

Q Did you during the course of your tenure in that department have occasion to recommend Mr. Barney, Mr. Barney' company, as a vendor in reference to requisitions that you were sending into the Purchasing Department?

A No.

Q You're certain, sir?

A Not to my knowledge, no.

Q Did Mr. Barney give you things of value for designating his company on a requisition form as the vendor in a specific order?

MR. EISENBERG: The client claims his privilege against self-incrimination.

THE COURT: Do you adopt the statement of your attorney?

THE WITNESS: Yes.

THE COURT: The witness has claimed the privilege.

Q Did Mr. Barney give you something of value in return for your ordering a certain quantity of goods from Tabulating Stock Forms, Inc.?

MR. KINGHAM: Asked and answered, your Honor, by invocation.

THE COURT: Well, I will overrule your objection and wait.

MR. EISENBERG: The client claims the privilege against self-incrimination.

THE COURT: Do you adopt the statement of your attorney?

THE WITNESS: Yes.

THE COURT: The witness has claimed the privilege against self-incrimination.

Q Did you do anything in your capacity as an employe of Pan American on behalf of Mr. Barney by reason of which he gave you automobiles or the use of his credit card or any other thing of value?

MR. KINGHAM: Objection, your Honor.

THE COURT: I will overrule it.

MR. EISENBERG: The client claims privilege against self-incrimination.

MR. FRIEDMAN: That's all, Judge.

THE COURT: The witness claims the Constitutional privilege against self-incrimination.

MR. FRIEDMAN: That's all.

MR. KINGHAM: I have nothing further, your Honor.

THE COURT: You are excused. Thank you very much.

Thank you, Mr. Eisenberg.

MR. EISENBERG: Thank you, your Honor.

(Witness excused.)

THE COURT: Mr. Friedman?

MR. FRIEDMAN: The defendant rests.

THE COURT: Does the government wish to call any rebuttal witness or present any rebuttal evidence?

MR. KINGHAM: We do not, your Honor. The government rests on the entire case.

THE COURT: Does the defense rest on its entire case?

MR. FRIEDMAN: Yes, it does, your Honor.

THE COURT: Very well.

Ladies and gentlemen, both sides have rested. I am sending you home at this time.

Ladies and gentlemen, all of the evidence is in. However, I am going to admonish you as you leave tonight not to discuss the case among yourselves or with any other person. Should you learn anything about this case from any source outside of this courtroom, you are directed to report the matter to me upon your return.

Finally, as you leave this evening, please, keep an open mind on all facets of the case until the case has been completed and given to you following my charge. Although the evidence is in, tomorrow you will be hearing the summations. Each attorney will indicate what he believes to have been derived from the evidence. After you have heard the attorneys' summations, I will instruct you on the law as it relates to this case; and then after that, we will give you the case for your consideration.

So three things basically will be occurring tomorrow involving each of the three groups here:

The first will be the attorneys, who will give you their summations, their closing arguments. Then the Court. I will instruct you on the law. And finally, the case will be given to you for your consideration.

So please keep an open mind until after the case is submitted to you following my charge.

The jury is excused. You are directed to return tomorrow at 9:30 a.m.

Good night.

(The jury left the courtroom.)

THE COURT: At this time I am prepared to hear any motion which the defendant wishes to make.

MR. FRIEDMAN: We renew our motion, Judge for a judgment of acquittal on the facts and the law.

THE COURT: For the reasons which I have already set forth, I believe that the government has made out a prima facie case on each of the three counts, sufficient at least for the case to go to the jury.

Accordingly, the motion which I consider to be for a judgment of acquittal is denied.

At this time, I am required under Rule 30 to consider the requests for instructions from counsel and to rule counsel's requests for instructions and to inform you of the substance of the Court's charge.

I am prepared to do that at this time. Before I do so, however, you would ask if in addition to the requests to charge heretofore presented, there are any additional requests which either side wishes to present.

MR. KINGHAM: None for the government, your Honor.

(Pause.)

THE COURT: Mr. Friedman?

MR. FRIEDMAN: I don't know what your Honor's charge will be on reasonable doubt, and there is I think in this Circuit the Nuncid case, I believe, maybe the one that governs that, that the jury can only be charged that it "may" find guilt and cannot be charged with the use of the word "must."

I have no additional requests to charge.

THE COURT: Just bear with me for five minutes.

(Recess.)

THE COURT: Of course, I will indicate initially that the jury's province to determine the facts, and their recollection controls. I will indicate to the jury that they may have any of the testimony or any portions of my charge read back to them if they so request; and I will indicate that if they wish to see any of the exhibits which are in evidence, or wish to see the indictment, they may call for any of these things and the documentary material will be sent in to the jury room.

I will indicate that the government has the burden of proving the charges against thedefendant beyond a reasonable doubt, that it never shifts and remains on the government throughout the entire trial.

I will indicate clearly that the defendant under our system of law does not have to prove his innocence. On the contrary, he is presumed to be innocent of the charges contained in the indictment.

I would then turn to reasonable doubt, the questi which you raised.

My charge will read in substance as follows:

"What is a reasonable doubt? A reasonable doubt is such a doubt as would cause prudent men to hesitate to act in matters of importance to themselves; it is a doubt which a reasonably prudent person has after carefully weighing all the evidence.

"A reasonable doubt is one which appeals to your reason, your judgment, your common sense, and your experience.

"A reasonable doubt is not caprice, whim, or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for the defendant or for his family. Vague, speculative or major qualms or misgivings are not reasonable doubts."

I will go on to indicate that it is not necessary for the government to prove the defendant's guilt to a mathematical certainty or beyond all possible doubt. I will conclude that portion of my charge with the statement that the law is such that in a criminal case it is enough that a defendant's guilt - be established beyond a reasonable doubt, not beyond all doubt.

I then will indicate that the indictment is not evidence, that it is a technique or method by which persons are brought to court, informed of the charges against them , and have their guilt or innocence determined by a jury such as will be here tomorrow.

I will indicate further that the indictment has no evidentiary value, does not constitute proof or evidence, and is an accusation, a charge.

Then I will discuss the indictment, the three counts and the elements thereof.

After I complete that, I will be discussing the matter of how the jury determines the truth, how they apprais the credibility of the witnesses. Essentially, I indicate that they should use their common sense. I will charge on aiding and abetting since that is charged in the indictment.

Inasmuch as the defendant has not taken the stand, I will charge essentially as follows:

"On another subject defendant has chosen not to take the witness stand and testify in his own behalf. There are many reasons why a defendant may decide not to testify. You should not speculate as to why the defendant did not testify. You may not draw any inferences from anyone whatsoever not taking the stand and testifying.

"The law does not impose upon the defendant the duty to call as his witness any persons who have been shown to be present at any of the events involved in the evidence or who may appear to have some knowledge of the matters in question.

"As I have charged, the burden of proof was on the government at the outset and remained on the government durin the entire trial."

I will discuss and try to illustrate what is meant by direct and circumstantial evidence, and will conclude by indicating to the jurors that they should not be concerned with the punishment to be meted out, that their verdict must be unanimous, and will indicate in response to your query, Mr. Friedman, "Your function is solely to determine the guilt or innocence of the defendant upon the basis of the evidence before you. If you believe that the evidence shows beyond a reasonable doubt that the defendant is guilty of any of the charges made in the indictment, you will find him guilty of the charges which you believe have been proven beyond a reasonable doubt.

"On the other hand, if you believe that the charges or some of them have not been proved beyond a reasonable doubt, the defendant should be acquitted on the charge or charges which you believe have not been proved beyond a reasonable doubt.

"On the other hand, if you find the law has been violated, then you should not refuse, because of sympathy or any other reason, to render a verdict of guilty."

I think I indicated that the verdict would have to be unanimous, and I will indicate that to the jurors as well.

If you have any comments which you wish to make with reference to what I have said so far -- if not, if there are any other matters which you wish to take up with the Court, I think this is the time to do so.

MR. KINGHAM: Your Honor, I have no comments on the matters the Court has addressed itself to. Does the Court intend to rule charge by charge on the government's and the defendant's respective requests? I don't recall the Court's practice in that respect.

THE COURT: I am prepared to do so.

Taking the government's requests first --

MR. FRIEDMAN: Before your Honor does that, may I suggest to your Honor --

THE COURT: Yes.

MR. FRIEDMAN: -- most respectfully, that your Honor indicated in a certain portion of his presumptive charge on reasonable doubt, your Honor used the words that the jury will find the defendant, and it is that language which I--

THE COURT: Yes, I stressed it to you because you had said the law is "may."

MR. FRIEDMAN: That is what I believe, that in this Circuit the instruction is required to be in the language "may" because "will" is equivalent to "must," and it mandates to a jury a finding; and I don't believe that is the rule in this Circuit. I think that the jury can listen to all the evidence in the case, characterize it as your Honor has characterized it. They may find the defendant guilty beyond a reasonable doubt but they must not --

THE COURT: I just wonder if you're really stating the law properly because my language is:

"If you believe that the evidence shows beyond a reasonable doubt that the defendant is guilty of any of the charges made in the indictment."

You said I should say "You may find him guilty"?

MR. KINGHAM: That is not the law as I understand it, your Honor. The requirement is if the proof has been established you must find the defendant guilt; if it is not established you must acquit him.

MR. FRIEDMAN: That's where we disagree.

If I may, I am using my authority for the distinction of those words the issue that is taken up before another judge of this court, and perhaps I can give your Honor the citation in the morning, the first thing, and maybe -- it's only one word which you might change.

THE COURT: Yes. I would be prepared at this time if it will help you, since on the other side of the coin I have used the words "should be acquitted," I would be willing to say "you should find,"instead of "will"; I will do that for you right now.

In other words, I will move it from a a "will" to a "should" and if you convince me that the law in the circuit is something else, I will change again but what I have said is, "should find him guilty and then on the other hand if the charges haven't been proved beyond a reasonable doubt, he should be acquitted."

So I think that is reasonably even-handed. I am prepared to do that in any event and if you have some Second Circuit decision which aids me further, which is presently the law, I certainly would consider it with reference to that one word.

MR. FRIEDMAN: Thank you, sir.

THE COURT: Now, turning to Mr. Kingham's comments, government's requests 1 through 6 will be charged in substance.

Mr. Kingham, I really had a question about request number 7 so far as the so-called gain to the wrongdoer portion is concerned, in view of the evidence adduced. I don't know that it helps matters, in view of the clarity

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of the proof, to add "I instruct you that it is not necessary for you to find that the defendant realized any gain whatsoever from the scheme in order to convict."

I mean, I thought it was pretty clear. I don't know that anybody is going to test on that that he received money. I think the defense is on other grounds.

MR. KINGHAM: Obviously, when we drafted these we didn't know what the defense was so I would consent to have it stricken. I would request it, indeed.

THE COURT: The request in toto?

MR. KINGHAM: No. The first sentence. I think it is important to point out to the court that the intended victim need not suffer any loss.

THE COURT: I think you are correct.

MR. KINGHAM: And then lead into the language from, ironically the Bryza case which we cited at the bottom there --

THE COURT: I see it now.

I think the way we can do that is to start 7 with "Because the essence of the crime charged is the scheme to defraud and not the result of that scheme, I instruct you that it is not necessary that the intended victim suffered any loss whatsoever."

MR. KINGHAM: That's fine with the government, your Honor.

THE COURT: Then I would suggest I would continue number 7.

I said before I would charge aiding and abetting; that's your request number 8. I may not charge it in the form you present it but I will charge it.

Then turning to the conspiracy count, your requests 9 through 14 will be charged in substance. They are, if I may use the expression, relatively standard at this point in time.

I will charge on accomplice testimony -- that had also been requested by the defendant.

I will include with the sentence "Their testimony is properly considered by the jury but it must be received with caution and weighed with great care," which was language I picked up from the defendant.

MR. KINGHAM: Your Honor, will the court charge request number 15? I think you indicated 9 through 14.

THE COURT: Sorry. I should have said through 15. I better not omit the overt act. That's a part of the conspiracy.

9 through 15 in substance. 16 in substance, 17, 18 on charts, and summaries, 19, 20 in substance.

I will not charge 21 which I assume to have been withdrawn. I heard no character evidence.

I will not charge 22 since the defendant didn't testify. I indicated what I would charge.

And I will charge in substance what you call the customary charges. I think I have indicated most of those already.

Any comments you wish to make, Mr. Kingham, with regard to the court's rulings on your requests?

MR. KINGHAM: No, your Honor. Thank you.

THE COURT: Very well.

Turning to the defendant's requests, I am going, for the record, to indicate that the requests will be charged in substance to the extent the court believes them appropriate but to preserve the defendant's record, I am going, pro forma, to deny the requests except as I charge them. Then I think the defendant's record will be complete. You can, after you have heard the charge as delivered, first, except where you believe the charge inappropriate and, secondly, you can make requests for supplementary instructions.

There was one point here that I wanted to discuss with counsel.

There is a portion beginning at page 8 of the defendant's requests, which addresses itself to the conflict of the interest form and it was not my understanding that the government intended that that should constitute a misrepresentation so as to constitute a fraud but perhaps I misapprehended the government's position with regard to that particular matter.

I thought it went more to matters such as intent.

MR. KINGHAM: Well, it does both, your Honor. I think at the side bar conference when we discussed it earlier in the trial we discussed it as a question of intent but of course paragraph 7 in count 1 of the indictment alleges that it was part of the scheme by Mr. Hasenstab to mislead the company by filing statements which were untrue and and I intend with the court's permission to refer in my summation to those with that in mind.

THE COURT: What do you have then to say with reference to this portiion of the defendant's requests to charge?

MR. KINGHAM: I think it is absolutely wrong and the reason I think it is absolutely wrong, aside from the fact that the conflict of interest form relates to paragraph 7 of the indictment, is that indeed if you sign and acknowledge and mail a form that is a misrepresentation, that can constitute a fraud. Although it is not the overall thrust of the government's case, it seems to me that it is clearly within the confines of the statute.

Furthermore, this instruction gives the impression to the jury, were it given, that the company must have some reliance on the statement -- that's at the bottom of page 9 -- and also that you cannot consider, even consider the statement until you find a fraud to have been committed.

Well, of course, if the statements were admissible as the court admitted them, even for knowledge and intent, you don't have to find anything to be committed before you can consider the statements, so the government would oppose that request in toto.

THE COURT: I have determined not to charge as requested under the title "The conflict of interest pledge alleged to have been signed by the defendant", and to the extent that that constitutes some error, defense counsel can except.

Is there anything further before I turn to one matter with reference to the charge?

MR. KINGHAM: Your Honor, there is reference to the charge as it relates to summations and legal theory.

If I go into it it will take a second and it will answer your Honor's question.

It seems that the defense legal theory of this case, which was partially articulated in Mr. Friedman's opening, had to do with the parameters of the mail fraud statute as it relates to Mr. Hasenstab's conduct, proven or otherwise, and I would suggest or request that no reference be made during the defense's summation to that legal theory which the court has ruled out and indeed I suggest by virtue of the acceptance of the government's requests to charge will charge out of the case under the court's reading of Maze, Pereira and the other cases in the mail fraud area.

What I am concerned with is a possible misleading, unintentional though it might be, of the jury into believing that more intent and knowledge and desire to violate the specific mail fraud statute is necessary her than actually is and although the court has ruled it out it seems to have formed a goodly portion of Mr. Friedman's defense of this case and I would be concerned that the jury not hear that again, having heard it without objection in the opening.

THE COURT: Mr. Friedman, you may want to address yourself to that and I think this would be the appropriate time for you to articulate for the record your defense because that's the point I was going to get to with reference to one more matter that I had been considering charging.

MR. FRIEDMAN: I don't think that I can be limited in my summation, Judge, to commenting upon intent, knowledge or wilfulness as the facts may be applicable to this case.

I think there is a question of fact as to whether or not the defendant intentionally violated the applicable statutes, whether he intentionally entered into a conspiracy, intentionally --

THE COURT: Yes, his intent is certainly an element which the government must prove.

MR. FRIEDMAN: And this is a factual matter for the jury to determine and I don't see how the court might even conceive of possibly restricting the defendant in his comment upon the evidence in this case and there is no question that a part of the defendant's summation is going to deal with the issue of intentional violation of the law.

The record here to some extent I think on the so-called wire fraud statute is barren of any specific testimony of telephone calls relative to a fraudulent scheme.

THE COURT: No. I am afraid I have to disagree with you.

MR. FRIEDMAN: I think there were general statements of the use of the telephone--

THE COURT: Mr. Barney testified on that subject during his direct examination. I think it would be that, at least in part, that the government would be relying upon and I recall that first of all, of course, he indicated he had an office at 115 Broadway and he spoke at times with Mr. Hasenstab at JFK; he spoke to him when he went to Rockleigh, New Jersey, and saw Welger and called him on the telephone from Rockleigh to JFK, spoke to Mr. Welger on the telephone when he called over to Rockleigh, New Jersey.

I recall a series of telephone conversations that were testified to yesterday afternoon.

MR. FRIEDMAN: But not as to the content, Judge, as it might relate to the charges. We don't know whether they made a date for dinner, whether it was a corrupt dinner, if I may use that expression, a dinner at which a corrupt purpose would be discussed, or whether it was in reference to some social amenity.

My recollection of the record is that there is nothing specific concerning the content of the telephone conversations.

MR. KINGHAM: I believe that there is testimony from Mr. Barney that on occasions when he called Mr. Hasenstab, the purpose of calling him and the content of the conversations was to prod him about being chronically late in getting the bills paid, which of course carry over to the tape recording and that goes to the scheme to defraud because if Mr. Barney doesn't pay, that goes to the kickback.

MR. FRIEDMAN: I think that is about as remote as you can get and as remote as they talk about in Maze and some of the other cases.

THE COURT. I gather the government wants to go forward with both the mail fraud, which I think is amply supported and wire fraud, which is far less substantially supported. I do believe that the quantity of the government's proof is greater by far on the mail fraud than the wire fraud.

MR. KINGHAM: I think there is sufficient evidence to send all three counts to the jury.

THE COURT: I would suggest to you that it is my recollection that there is enough but I do comment that the quantity of the evidence as it relates to mail fraud is considerably greater than the wire fraud.

I am going to let that stand.

I am going to let counsel comment on his theory of the case. I must say there was one theory which I did not agree with and I said so during the argument and that is that the mailing must be of the payoff money or the bribe money. I know you brought out from Mr. Barney on cross, although I thought it was pretty clear from his direct testimony, that this was always cash, no checks, no credit, up to a point anyway, no wires, money from home or otherwise but a hand to hand passing in various places and I really don't think that it is necessary that you have that; else you have no crime at all.

The problem that you will face, counsel, if you do hang up your hat on that is, number 1, the rebuttal summation of counsel and, number 2, a comment by the court because I do not believe that that is a necessary element-- that is, that the payoff or bribery be transmitted by mail or by wire. I find it more than sufficient if the Pan Am disbursement checks are transmitted by mail and course Mr. Barney indicated that they were.

So I just want to advise you of that.

There is one other problem, if you have nothing else to raise, Mr. Friedman or Mr. Kingham.

MR. FRIEDMAN: No, your Honor.

I have nothing else to raise. I think my position is fairly clear and I will assume from your Honor's comment with reference to my taking exception is that if it is required at this stage of the proceeding that exceptions be taken I would assume they would be taken but I would ordinarily --

THE COURT: I suggest it would be better and I think to preserve the record, I have ruled but you also haven't heard my charge in its full context. I think you should reserve the exceptions and I will give you that opportunity when I complete the charge.

I will call you to the side bar and I will ask if you except.

MR. FRIEDMAN: Fine. I wasn't quite sure of the practice.

THE COURT: After that, I will ask if there are any requests for supplementary instruction.

With that in mind is there anything else which either of you would like to raise before the court would like to raise the last point.

MR. KINGHAM: No, your Honor.

THE COURT: The one thing we have not covered and we have not discussed is something that we mentioned at the outset which I thought you touched upon, Mr. Friedman and that is the matter of entrapment. I have no requests to charge from either side on that subject and my first query is to you, Mr. Friedman, as to whether you wish to interpose the defense of entrapment and wish a charge on that subject.

MR. FRIEDMAN: I think I would, Judge. I guess I was a little bit negligent in not repeating it, in view of our conversation at the commencement of this trial where I indicated my position to your Honor and I guess I relied upon the fact -- I thought that your Honor would pick up that matter.

I recognize that the subject of entrapment is kind of an estoteric subject--

THE COURT: It is more than that and the question here in this circuit is still not free from doubt and I am not going to pass on it today other than to say there is a strongly held view that in order to promptly assert the defense you must admit the underlying crime.

Now as I said, I believe the question is still subject to some debate in this circuit but I would note that so far I have no requests from either side on that particular issue.

MR. FRIEDMAN: I think it is quite clear that by the opening, if in fact counsel can bind the defendant, we acknowledged the receipt of moneys for the purpose of this trial and under those circumstances there would be, by counsel, if you will, some admission as to fact and I am unde the impression that it is an admission as to the fact which is truly required; that's the position that I would take.

I don't think that we have to acknowledge wilful, intentional violation of a fraud statute.

Now, I understand what your Honor says about the rule in the circuit. I don't think there is any point in my making extended discussion upon it because I certainly don't have any information which I could authoritatively guide your Honor on the issue. I think that we would want that insofar as it is applicable to the case.

MR. KINGHAM: I object, your Honor. First of all, I am a little troubled by the concept of entrapment on the facts of this case where, if there is an admission that the defendant received the money, that receipt of money obviously preceded the time when Mr. Barney became an agent of the government.

Now, Mr. Barney is not an agent of the government under those circumstances, and there is no evidence here of inducement, really, offered by the defendant, I see no factual basis for submitting an entrapment charge to the jury. Indeed I think it would be quite confusing on the law of entrapment as I understand it.

THE COURT: Well, I had some exposure to the problem. I retried the Anglada case which was, if you recall, reversed by virtue of the district judge's failure to charge on that subject. I think this case can be distinguished from young Mr. Anglada and of course I did have what was close to the classic situation I suppose in the ordinary case.

My present disposition, and I have been considering this matter for a couple of days, is that there is enough in the record to justify a charge on the subject but what I am going to do is I am going to wait and see how it is developed in the summation.

I tell you now that if I feel that it has been developed and I point to Mr. Friedman, if he just leaves it alone, that's another story but if he argues the point he then subjects himself to your counter arguments and your rebuttal summation and I think at that time it would be appropriate for me to explain the defense of entrapment to the jury and indicate the various elements thereof.

So I would advise you both that if the matter is brought up by the defense after you have had the night to think it over and how you are going to present it, counsel I am prepared to charge on the subject and therefore I would invite, if anyone wishes to submit a request to charge on that subject, that that be done first thing in the morning.

I think we have concluded the matters as they relate to the court's charge.

Mr. Friedman made an inquiry regarding the time frame and I think that is appropriate.

The government of course will commence the closing argument. The defense will follow. The government will reply as is the practice by rule in this district and I would ask each of you, because I would like to give you equal time, to indicate how long you expect to be, taking your two parts together and dividing them up any way you see fit, what is the aggregate time that you see?

MR. KINGHAM: I would say 40 to 45 minutes at the outset, your Honor.

THE COURT: I would think 45 minutes is a reasonable summation in light of the number of witnesses and the documentary proof which has been presented here.

Mr. Friedman?

MR. FRIEDMAN: I would think, Judge, that perhaps 30 minutes might be the maximum for me.

THE COURT: I will give each side up to 45 minutes. If you can do it in less, fine but I am going to give you that as a reasonable outside limit.

Is that agreeable, Mr. Kingham?

MR. KINGHAM: It is.

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THE COURT: Mr. Friedman, you have already indicated that you expect to proceed in approximately 30 minutes.

Then I would think the jury should have the case, assuming they all show up on time, by about 12:30. That would be my estimate at this point.

Very well, we will recess now until tomorrow morning at 9:30.

(Adjourned to 9:30 A.M., August 26, 1977.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
George J. Barney(resumed)	381	384		
George Kassab	481	488		
Saul Welger	517	522	559	

EXHIBIT INDEX

Government	Identification	In Evidence
13A through 13-I		485
14		487
20	522	
Defendant		
K		495
L		543
Court		
6	536	

United States of America
v.
William E. Hasenstab

August 26, 1977,
9:50 A.M.

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THE COURT: It is now ten minutes of 10. I have been waiting for all of the jurors to assemble. I am advised that one juror, Mr. Vega, who has been late every morning is not here.

When my deputy clerk noted that a few minutes ago, he made a telephone call to Mr. Vega and Mr. Vega's home is in the Bronx.

It appears that the telephone call awakened Mr. Vega, who indicated to Mr. Guranich that he had overslept and was getting up and would come down.

I propose, since we have 13 jurors and we are moving into the summations and charge, to move the first alternate juror into Mr. Vega's seat.

If there are any comments, I would hear them at this time.

MR. KINGHAM: No objection from the government, your Honor.

MR. FRIEDMAN: Well, I would suppose, Judge, that the altenrative would be to wait whatever length of time it would take Mr. Vega to get here.

THE COURT: To get dressed, leave his home in the Bronx and arrive here at the courthouse.

MR. FRIEDMAN: Once as I indicated for the record, having worked in the Bronx, the problems he may have finding his way down. I suppose as a practical matter we don't have much choice and I will raise no objection. I think it is the gentleman, the first alternate.

THE COURT: I believe it is and I will bring the jury in in a moment or two and explain to them that Mr. Vega has not arrived and that I am moving the first alternate juror into the seat. I believe he is juror number 5 and I will do that.

MR. FRIEDMAN: Before your Honor does that, that is, brings in the jury, your Honor asked for some comment by counsel on the entrapment issue.

THE COURT: Yes. I have done a lot of work on it overnight.

MR. FRIEDMAN: I think maybe I can save you work and I am going to withdraw the request that your Honor charge on that issue and pass on, if I may, to another issue.

We had discussed at the bench the question of the language in respect to your Honor's charge on reasonable doubt and your Honor had indicated he would withdraw the word "will" and I think your Honor indicated he would use the word "should" and if that word is to be used, I would still find it legally offensive and --

THE COURT: You would prefer the word "may". I will charge the word "may".

MR. FRIEDMAN: That's very good, Judge. That's fair.

Could I also ask if your Honor has not included it in the specifics of the charge to use language which in effect would indicate that the use of the mail is an essential element of the crime.

THE COURT: Let me check. That of course would be as to Count 1.

MR. FRIEDMAN: Yes, Judge.

Yes, I say that as a matter of fact and I use the following language "Count 1 rests on the mail fraud statute. To satisfy the requirements of that statute and, third, essential element in this count, the proof must show that there was at least one use of the mails which was the purpose furthering or executing the alleged fraud."

MR. FRIEDMAN: Thank you.

THE COURT: So that is there.

MR. FRIEDMAN: May I ask also that your Honor consider a reference to the presumption of innocence indicating to the jury that the presumption of innocence in order to be rebutted must be outweighed by the evidence beyond a reasonable doubt.

THE COURT: Well, I may not use that exact language but I think it comes out pretty close to that. Let me indicate to you how my charge reads on that and I think this covers it. "William Hasenstab has pleaded not guilty and therefore the government has the burden of proving the charges against him beyond a reasonable doubt.

It is a burden that never shifts and remains on the government throughout the entire trial. A defendant under our system of law does not have to prove his innocence. On the contrary, he is presumed to be innocent of the charges contained in the indictment. The presumption of innocence was in his favor at the start of the trial and continues in his favor throughout the trial. It is removed only if and when you are satisfied that the government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt."

That is how I anticipate charging on that subject.

MR. FRIEDMAN: Would it be fair to anticipate that your Honor would charge the generally accepted law on the rejection of testimony by a witness if it is disbelieved and the rejection in whole or in part and so on.

THE COURT: Let me turn to that.

"You may of course take into consideration the interest of a witness. An interested witness is not necessarily unworthy of belief. That is just one factor, however, which you should consider in determining the weight and credibility to be given to that witness' testimony.

Now, if any witness has wilfully testified falsely to any material fact you may disregard all of his testimony or accept such part of it as you believe worthy of belief or as it appeals to your reasonable judgment.

That's what I give.

MR. FRIEDMAN: That's fine. I couldn't have written that better myself.

THE COURT: Somebody else wrote it before I did.

Please bring in the jury.

(The jury entered the courtroom at 10 A.M.)

THE COURT: Good morning, ladies and gentlemen.

It is now 10 A.M. and you will note that juror number 5, Mr. Vega, has not arrived.

I have conferred with counsel and have determined to excuse juror number 5 and I am going to ask Mr. Peter J. Dzialo, our first alternate juror, to move into seat number 5.

Mr. Dzialo, you will now be juror number 5 and we will be left with one alternate juror.

Ladies and gentlemen, as I said before you left yesterday afternoon, today we come to the final portion of the trial. Three parts, three groups of people to do their part in the administration.

Part 1, the summations or closing arguments. They will be delivered as follows:

Mr. Kingham will sum up for the government, Mr. Friedman will sum up for Mr. Hasenstab. Mr. Kingham will then be given an opportunity to reply. Following that, we shall take a brief recess and after the recess I will instruct you on the law.

Following that, the matter will be turned over to you ladies and gentlemen for your consideration. Depending on the time, you will either be asked to deliberate briefly and then be sent out to lunch -- the government will be paying the luncheon checks -- or, if we run later we will be going directly to lunch. I would anticipate that we will be going to lunch at about 1 P.M. and as I say, you will be coming to that final portion of the case where the case will be given to you for your consideration.

I wish to thank the jurors who are here now for their attendance, their attention and I know that you will continue today to give each of the persons who will be placing matters before you, counsel and the court, your complete and undivided attention.

We will proceed now to the closing arguments.

Mr. Kingham?

MR. KINGHAM: Thank you, your Honor.

May it please the Court, Judge Ward, Mr. Friedman and members of the jury:

You know now from the evidence in this trial that Bill Hasenstab was a disloyal employee, a dishonest employee, an employee who cheated his company, Pan American of at least $50,000 that he stuffed in his own pocket in order to help George Barney increase his business, get more business and you know that together with Mr. Barney and in furtherance of that scheme, he caused the company to mail checks to Mr. Barney and you know that in furtherance of that scheme Mr. Barney made phone calls to and from New Jersey to JFK, to his office at 115 Broadway and you know that they acted together, Barney and Hasenstab; together to get money out of Pan American, money to get big business for George Barney and money to get kickbacks for Bill Hasenstab.

Now, let's take the guts of this case. Is there a fraud, is there a scheme to defraud Pan America, is there a scheme to defraud anybody? You bet there is.

Look at the evidence. There is no question Mr. Hasenstab took large sums of money. He himself admits it on the tape, admits taking $24,000 in cash from Mr. Barney during 1976 and alone and the last payment, as you know, was a $3,000 cash payment in September or October and he admits that on the tape.

Of course there is no question that he took large amounts in the years before, probably another $25,000 or so according to Mr. Barney's testimony and that wasn't challenged on cross-examination of Mr. Barney. All right, he tock a lot of money. Where is the fraud? I think that you can find, ladies and gentlemen, from your experience and from Mr. Barney's testimony that a man in Mr. Barney's position, a man who is out hustling business, a man who is out paying off all over town, isn't going to pay $50,000 in cash and not get something in return and he did get something in return in this case. He got contracts, he got purchase orders, he got extended contracts without having to bid competitively against the other companies and you also heard that by 1976 he got $500,000 worth of business from Pan American alone.

Well, it is very nice for me to stand here and say there is a fraud. What's the evidence of that fraud? First of all, with respect to Mr. Barney's company, Tabulating Forms, what kind of a bid system was used? A little bit different from the way things are done normally at Pan Am. In this situation, it was Mr. Hasenstab, the defendant, the supervisor who got the prices. Mr. Hasenstab who told Mr. Di Napoli what prices to put down on the forms.

That brings me to Mr. Di Napoli. The defense, as you know, through cross-examining Mr. O'Toole for a day and a half, established to the surprise of no one that all these documents or most of them have the buyer's name on them. Mr. Di Napoli is on most of them for Tabulating Forms, Mr. Mardoza, Ms. McAdams, but not Mr. Hasenstab. Well, of course you know why that is. That's because Mr. Hasenstab is management and management is not supposed to fill out the paper work. Mr. Di Napoli is a union employee and the rule at Pan Am under their collective bargaining contract as you heard Mr. O'Toole testify is that the union employees must do that type of work. They fill out the papers; they are supposed to get the bids, too, but what happened here? In most of the Tabulating Forms contracts Mr. Hasenstab gave the prices to Nick Di Napoli, told him to write the prices down, said these are the prices, you go ahead and write the prices down and lo and behold of course, Mr. Barney's company, Mr. Barney who is paying off, his company becomes the low bidder and of course they get the contract.

On cross-examination, do you remember Mr. Di Napoli being asked why did you do that and he said, and I think you will find truthfully, I did it because he was my boss, he told me what to do; he is the boss. And I also did it because he was experienced and I assumed he knew what he was talking about and I think you can find,ladies and gentlemen, that Mr. Hasenstab knew exactly what he was talking about. He was an experienced buyer of these forms and he was the boss and he told Nick Di Napoli to do it and Nick did what he was told.

After all, what is so unusual. The forms have to get processed through Mr. Hasenstab every time anyway and what a great coverup for Mr. Hasenstab. What happens when he gets caught? Can't he say and didn't he, through counsel, cross-examination Mr. O'Toole to say, my name is not on these forms, it is all Mr. Di Napoli. If he has a problem that's his tough luck. But I'm not on the forms. That's Di Napoli. You know how you remember that's a coverup. You remember in the January 6th restaurant conversation when they are talking about Tom D'Angelo, the fellow over in New Jersey, and they are talking about who is going to do the paper work and who will get in trouble if there is a markup on that contract and Mr. Hasenstab says to George Barney, he's the guy, D'Angelo, who is going to have it in a sling because in essence he is the guy who is doing the paper work.

But who is the guy who is jacking up the prices, fixing the bid, fixing the contract? It is Mr. Hasenstab and didn't he do the same thing with Nick Di Napoli. Didn't he come in here and try to sacrifice Nick Di Napoli to take the weight off himself?

There is more evidence that shows you that Mr. Hasenstab and not Mr. Di Napoli was doing the work and it is right on the tape recorded conversations. Who is sitting in the car with George Barney discussing prices. Who is sitting in the car with George Barney discussing what the prices will be for next year's stock computer paper contract. The buyer, Di Napoli or the supervisor, Hasenstab, who is on the take?

What else shows there is a fraud? Prices were fixed. Bids were rigged. You remember Mr. Barney testified that the way he got business was Hasenstab, the supervisor, Hasenstab, would tell him what requisitions he expected to get in, what the contracts were going to be, what the orders were going to be and Mr. Barney would say, my price is going to be such and such and then what would Hasenstab do? Would he simply go back and throw it in the mill and give it to the low bidder? No. He would tell Mr. Barney to adjust his price sometimes -- sometimes down to get it underneath the competitors and sometimes up.

Now, do you imagine that Pan Am expects its supervisor to be negotiating with a vendor for higher prices? That's a fraud because the higher the prices that Mr. Barney can get out of Pan American, the higher the kickback at 5 percent that Mr. Hasenstab will get from Mr. Barney. Are they fixing bids, are they fixing prices? Again, the conversation of January 6th talking about that D'Angelo situation over in New Jersey.

You can't mark that one up, George, says Mr. Hasenstab, and you can't mark it up because somebody might find out and point the finger and start looking at everything George Barney does and we can't have anything like that happen.

And so they are fixing bids and they are fixing prices, ladies and gentlemen, and Pan Am doesn't know about that and that's a fraud.

What else shows you there is a fraud here? And this is probably the most interesting aspect of the fraud and I say that because there has been so much testimony about it and that's the stock Tab contract, the contract for computer forms.

What happened there? You know that there is a yearly supply of computer paper that goes to the computer center in Rockleigh, New Jersey. There is no question about that.

For the year 1975, Moore Business Forms which you will see from the records that are in evidence is one of the largest business forms suppliers -- they have got offices all over the country. It is right on the record that the defense put into evidence.

Moore has that contract for 1975. All of a sudden, in the middle of the year along comes Mr. Barney with this smaller company and he gets a piece of the contract. Well, first of all, it would be logical for you to ask, what does Moore Business Forms do about that. The answer to that is very simple as Mr. Barney testified, he paid off Bill O'Brien, the Moore salesman so he wouldn't squawk.

Takes care of Moore and Moore doesn't have a problem because Pan American is still going to use their paper because they have got an inventory in stock.

So, Moore is out of the way but how does Mr. Barney get that contract? He says he got the Moore price, found out what the Moore price was, from the defendant and from Saul Welger. Mr. Welger denied that but let's assume that he got it from Saul Welger. How do you think he got it from Saul Welger? The answer to that is very simple.

Saul Welger has in his possession the purchase order for the Moore contract that was in existence because they always got the purchase order and the defense put it into evidence as an exhibit and it's got a price on it -- Defendant's Exhibit J2 -- the unit price is $6.35. Probably a thousand. Tell that to Mr. Barney and he comes in with his bid. Bid. I say bid, there were no bids. He gets it at a price that looks like $6.10 or maybe it is a little higher, it is crossed out. I any event, it is underneath the Moore price. How does he get it? From Welger and the defendant and he tells Mr. Hasenstab I don't need to know the Moore price. Saul gave it to me.

What is Mr. Barney doing with that piece of that contract when it is a Moore Business Forms contract?

How about 19[illegible] of that contract? Simply extended, no bids, no competitive bids, nothing and this is a very interesting aspect of the proof because you may say to yourself, ladies and gentlemen, if every time they put out a contract they work up all these forms, they have a requisition, they have bid quotations, bid backups, they have all these forms, where are those forms for the sto computer paper contract for 1975 and 1976? You know where they are. They are missing. They should have been in the files at Kennedy Airport where all these other things were. Mr. O'Toole testified to that. They went to look for them during the audit when Mr. Hasenstab was still working there, earlier this year and they couldn't find them. Now, is Mr. Hasenstab responsible for that? Who knows but what is interesting is that in those files the auditors and you, ladies and gentlemen, should have found bid sheets, quotation sheets, backups, all the things that are normally in the file, but you know that they don't exist for this contract.

2 a.m. mblt 1

And that would have been proof positive to the auditors and to you of Mr. Hasenstab's guilt.

One last thing about proof of the fraud here:

Did Mr. Hasenstab tell Pan American that he was taking cash every month from George Barney? Did he disclose it? Did he turn it in to Pan American? Did he turn Mr. Barney in to Pan Am? Or did he lie? Did he send in these forms? Did he promise that he didn't know about any conflict of interest? Did he promise that he wasn't taking a benefit?

And if $50,000 isn't a benefit, ladies and gentlemen, what is?

Cover up. And that's a fraud. And how about the use of the mails? How else, I ask you, are the bills going to go from Mr. Barney to Pan Am? How else are the invoices going to travel? How else is he going to get paid?

This stack of checks, just a portion, 1972 through 1976 in evidence, all came in the mail. That's a lot of money if you add that up against the disbursements set out on the chart. And these were mailed.

Where were they mailed from? Pan Am Building, New York, New York. It says it right on here, to the various addresses. Some in Manhattan, Long Island City, when they were over there.

mblt 2

Now, why does the mail have anything to do with this scheme?

If Mr. Barney can't get these checks, he can't get his money. And if he can't get his money, Mr. Hasenstab can't get his money,and there is no kickbacks. So the mails have to be used. It is essential to this.

Does Mr. Hasenstab know the mail is going to be used? Of course he does. He's been dealing with Mr. Barney since 1968 or '67.

Telephone. Was the telephone used across state lines here? Sure. Was it used in furtherance of the scheme here? Sure. Why? How does Mr. Barney prod Hasenstab to get the bills paid, the push the orders through? He calls him. He testified to that. Calls him from New Jersey.

How does he get Mr.Welger to put in more orders, more requisitions, to check on the stock? He calls him. Where does he call him from? He calls him from New York. But where is Mr. Welger? He is in New Jersey.

Can you imagine that in the course of the business of Pan American and in the course of the business that Mr. Hasenstab and Mr. Barney are doing together, that Hasenstab does not know and does not expect Barney to keep calling Rockleigh, to call him from Rockleigh, to keep things moving? Because you got to keep things moving, ladies and gentlemen.

mblt 3

If you don't keep things moving, the money stops, the checks don't come, and the kickbacks don't come. And you heard how Mr. Hasenstab got on the tapes when the kickbacks weren't coming. YOu know what he said on January 6th:

"I keep putting out the orders. I keep doing the work, and I am not getting a thing for it. So let's go back to the $3,000 a month, George."

Is there a conspiracy here? That's simple . It is joint action. It is the two of them together. That's what that means.

Judge Ward will instruct you. You will see that.

Mr. Barney and Hasenstab getting the bills paid. Barney and Hasenstab making sure the requisitions are going through. Barney and Hasenstab splitting up 5 percent for Mr. Hasenstab, the money that comes out of Pan American.

Now, I think you can expect Mr. Friedman in his summation as he did on his opening to talk to you about intent and knowledge. And indeed he should. Because as you will hear those are essential elements of these crimes. And you are not going to convict Mr. Hasenstab unless he knew and intended to do what he was doing, and Mr. Friedman undoubtedl will say this is not about morality, it is not about tax evasion, it is not only about the fact that Mr. Hasenstab got a lot of money. And I also suggest to you, regardless of the fact that Mr. Hasenstab got $50,000 in cash, you are supposed to believe that he never untended to use the mails or the phones in a conpsiracy with George Barney.

If you want to believe that, fine. But you know from the evidence we just reviewed,the evidence you heard in this courtroom, that that isn't so.

On intent, let me ask you this:

Can you imagine that Barney took $50,000 of what was really his company's money. You know who pays that money. I mean the consumer really pays that money. Because the consumer pays for the paper and the consumer pays for the money that goes to George Barney, and the consumer pays one by one, just a little fraction, but it adds up to $50,000 in cash for Mr. Hasenstab.

Can you imagine that Mr. Hasenstab took that money, filed false conflict of interest forms with his employer, violated the bidding procedures that were established and that he knew in his company and did not intend to defraud Pan American? Can you imagine that?

What do you think would have happened if Pan American had known about it? What do you think would have happened if he told Pan American? You know what happened after the audit in 1977. Instead of filing another lie,

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another false conflict form, Mr. Hasenstab resigned.

Mr. Friedman will talk to you about this.

Can you imagine, ladies and gentlemen, that in all those years with the company, all those years of dealing with George Barney, Mr. Hasenstab did not know exactly how the system worked; did not know how the mails were used; did not know how George Barney had to call Rockleigh; did not know how George Barney had to call him? Do you really think he is that naive? Do you really think he took $50,000 for nothing?

It seems that's what the defense, at least from the opening, would have you believe, but I submit you are not going to be fooled by that.

Before I close let me say something about George Barney.

You know all about his motives. You know he has cooperated with the government, you know he has an agreement, pleaded guilty, testified in a couple of cases. I'm sure Mr. Friedman will attack his credibility in his summation and when I get up to speak later, I may say a few more things about that, but you know this case is not just George Barney.

He has corroborated, and that hard to say word simply means that there is other evidence that shows you that what he is saying happened the way he says it happened. He's corroborated by Mr. DiNapoli; DiNapoli says George Barney dealt with Hasenstab.

Does DiNapoli have any motive to come in here and lie to you ladies and gentlemen? You saw him on the witness stand. You heard him answer the questions. You decide.

He's corroborated by Mr. O'Toole. He testified about the system. The system wasn't followed from Mr. Barney's company but he's corroborated most of all by his conversations with Mr. Hasenstab that you heard the defendant's own words.

He tells you he had a deal with Hasenstab. Hasenstab confirms it on the tape. Tells you, for example, that his business went down in '70-'71, picked up again when he resumed the payoffs. You got a chart with all the numbers for you. That's exactly what happened.

He is corroborated. It is not George Barney against Bill Hasenstab. It is George Barney and all the other evidence in this case that bears his story out.

Let's talk about Saul Welger, who, as you heard, you and I met yesterday for the first time. Whatever Mr. Welger's other problems may be, one thing is pretty clear, one thing he did for us allis he clarified how the bidding system worked.

You remember all the cross examination of Mr. O'Toole; wasn't it DiNapoli, wasn't it Welger; isn't Welger's name on here as the fellow who can draw down against the inventory? Sure.

What did Mr. Welger tell you? He told us that he's known Mr. Hasenstab -- here it's interesting, Mr. Welger is a defense witness and the defense doesn't even ask him if he knows Mr. Hasenstab.

What are they trying to hide?

But I asked him, and he responded:

"I know Mr. Hasenstab. Known him for years. And every time I had a requisition it was my practice to deal with Mr. Hasenstab."

Not DiNapoli, not O'Toole, Hasenstab.

Who set the prices? Hasenstab.

Who got the quotes? Hasenstab.

Was he challenged on that, ladies and gentlemen? Not at all.

How does the system work? The system on which the defense puts so much emphasis is very simple. When Mr. Welger needs paper, he writes out a requisition just like these, they are all over the place, you are welcome to look at them if you want to. And he sends it to JFK to Mr.

Hasenstab. And Mr. Hasenstab gets the prices, arranges the contract, the contract goes out and he gets a copy of the purchase order. So he knows that there's been an order, what the price is, and that he, Mr. Welger, can contact the vendor, he can call Mr. Barney and say, "Okay, the order's gone through, send me the paper."

And then every week he would call Mr. Barney and say, "Send me more paper," because as you know, it is an annual contract for an annual overall requirement, but Welger doesn't make the contract. Hasenstab does.

Something that's very telling here:

The questions we asked Mr. Welger yesterday about the extension of the 1975 stock paper contract, and I'm sure you remember that Mr. Welger told us he didn't have anything to do with that. And he couldn't have because he was in the hospital in Florida and then he was recuperating at his home in Brooklyn, and he didn't go back to work until December and as you heard, those contracts, if they are re-negotiated, which this one wasn't, would be re-negotiated during the time that he wasn't even at work.

And why wasn't it re-negotiated, ladies and gentlemen? Mr. O'Toole tells us the procedure is that contracts of that size, this is a $300,000 contract, must be re-bid for each year.

Were there any bids? Defense's own documents show that there weren't any. It was simply extended.

"Go ahead, George, take it for another year at the same old price. It will get you $300,000."

It is interesting, isn't it? It got Mr. Hasenstab $24,000 or $25,000 if you add the 1,000 in December. $25,000 in cash to Mr. Hasenstab with the flick of a pen.

And there is no fraud here?

Whose money is that? It's Pan American's money.

Mr. Friedman is next. It is his opportunity to make his summation as it has been mine, but I ask you to ask yourselves as he speaks, ladies and gentlemen, if the defense in this case isn't just so much smoke, if it isn't an effort to divert you from the facts, to divert you from what must be to you the obvious guilt of Mr. Hasenstab, because you know when that smoke is cleared, when you think about the facts, when you think about the promises Mr. Friedman made to you in his opening which have been unfulfilled in this case, you will see that Hasenstab is guilty.

Whatever Mr. Welger's problems are, whether or not Mr. DiNapoli turned in his boss to the union, what you come out with when the smoke is cleared is Hasenstab's guilt.

Your experience, your intelligence, your common sense, is going to tell you that, and you will convict him.

THE COURT: Thank you, Mr. Kingham.

Mr. Friedman.

MR. FRIEDMAN: Thank you.

If your Honor please, Mr. Kingham, members of the jury:

I having said to you in the very beginning of this case, you will remember, that I did not condone Mr. Hasenstab taking money; I did in fact alert your attention, I think, to the question of whether or not Mr. Hasenstab's taking of money would be found by you to be a violation of the mail fraud or wire fraud or conspiracy statute; and I had asked you at the time to listen to the evidence, and to weigh the credibility of the witnesses because indeed, as Mr. Kingham seeks to undercut the summation, this is not a trial of Mr. Hasenstab's morality. It is not a trial as to whether or not he should have taken money. It is not a trial in reference to taxes.

Rather, the question is was there a willing and knowing violation of the mail fraud statutes. And that is really very important to determine because that is the sole issue in this case, that and the conspiracy to violate the mail and wire fraud statutes. That's the question that you are going to have to determine, and this is not a trial of any other issue. Any other issue is left for another forum on another day.

In this particular case, as in every jury trial, it is for the jury to make a determination of the issue of facts in the case. And it is your function. You weigh the facts, you make the decision.

In this case, it is charged that there was a scheme or plan to violate the mail fraud statute, a scheme or an artifice to violate the wire fraud statute.

Can you say as reasonable people although the course of conduct of Pan American's business obviously involves the use of the mail and telephone by people, can you say that honestly as much as you may not like the idea, as much as Mr. Kingham protests it, as much as Mr. Friedman says "I don't condone it," can anyone really say that there was a conspiracy to violate a mail fraud statute in this case; a wire fraud statute, through the use of interstate telephones in this case?

If that be true, if that is the interpretation you as the trier of the facts put on this case, then every telephone conversation that goes on in this country from state to state and every piece of mail that goes from Frisby Avenue in the Bronx to 100 Centre Street or to Madison Avenue, comes within the jurisdiction of what Mr. Kingham claims is a fraud if there should be something amiss between the relationship of the parties. You are going to have to make that determination.

There is no one in this case, no one in this case, who tells you, the members of the jury, how you determine the facts in the sense of telling you you must decide them this way or that way. Not me, not Mr. Kingham, and not even his Honor who is charged with giving you the law.

And each of you when you make your determination in this case have your own vote, and the integrity of your own vote, and you must make a determination as to whether or not in your minds, your individual minds, you can consciously say that there was an intent to violate of wire fraud and mail fraud statutes or conspiracy to violate them, agreement, a corrupt agreement between the parties to violate those statutes.

It hardly seems likely in this case but that's the issue for you to determine.

On the specifics of it, has there been testimony in this case, has there been testimony in this case, of any instance of where the price of goods was increased to Pan Am? Every bit of document that I saw in evidence, all of the conversation that I saw and heard, had to do with "You got to keep the price down because if you don't somebody is going to get in trouble."

And in fact, the records show that where the bids are annexed to all of these contracts that the defense had to introduce, wherever it was a bidable contract, and Tab got it, the price is the lowest price of the lot.

Is there any testimony here of any conversation, I will call it a corrupt conversation, by telephone, from state to state? Is there anything wrong with the fact that Tab is shipping goods to Pan Am, as Moore is; that the supervisor should be urged to get the payments along?

"My company wants to be paid."

And what did that have to do, really, can you say, can you say that that was a scheme or a plan to use thos mails so that Mr. Hasenstab could get his money? I don't think so. I really don't think so.

And that again is the issue for you to determine.

Mr. DiNapoli I think said he takes an estimate. He knows, you know, Mr. DiNapoli is working for that company a long time. He takes an estimate.

"Well, 60 percent of time over the years Hasenstab told me what to put in."

That's his job as a purchasing agent to do it. I don't know whether Hasenstab told him to put some of these items in. I take the position that if he did, so what? If they were the lowest bid and put them in on the contract, so what? It doesn't mean anything. There is no violation of law to say, "Here's the three bids; this is the one that's the lowest."

Is that a crime? Has anybody showed you any bid form where it's the highest, where it's the middle? No one came in from Pan Am. The auditors. No one came in to say this is the highest one.

Let's take Mr. Barney.

Maybe the case isn't all Mr. Barney. A lot of the case is. Why is a lot of the case Mr. Barney? It is alleged that they had a corrupt plan or scheme, that they had schemed to violate, not for Mr. Hasenstab to get the gratutity, how much Barney thought it was worth. They had a scheme for a violation of the mail fraud statute, the wire fraud statute.

What evidence is there, truly? Look at Mr. Barney's testimony and you now have to make a judgment. You have to decide whether you are going to accept or reject Mr. Barney's testimony, and his Honor is going to give you instructions as to the circumstances under which, if you find that a witness has lied in a material respect, concerning his testimony, you are free as finders of the fact to reject all of his testimony or you may accept or rejct such parts as you deem appropriate.

And let's look at Mr. Barney's testimony. You had an opportunity to observe his demeanor. The way he answered the questions; and I'm sorry for Mr. Barney. He is under pressure. He is under pressure. He has his wife at home, he's told you. He is trying to stay out of jail, we know that. But he knows that. An essential element of this case is for him to testify to a corrupt agreement. He knows that. And he hedges on the questions about the payment of the money, and finally in fact did Mr. Hasenstab ever say to you, "Give me the money or you don't get the contract"? And what did he say? "No." That was his answer.

When he was asked, members of the jury, during the course of the cross examination, questions relating to his statement to the FBI, to Agents Lynch and Marshon. Look at 3509 I told him. Read it. "Didn't you tell Agents Lynch and Marshon that Welger had recommended your company as the vendor, the supplier of the goods?

He says no.

Later on, maybe, I don't even remember now, and your judgment is best, maybe later on he says, "Yes, I remember now." I'm not quite sure of the testimony. But at first he said no.

"Q Mr. Barney, didn't Welger give you the prices?

"A No.

"Q Mr. Barney, didn't you tell Agents Marshon and Lynch that Welger gave you the prices?

"A Well, he gave them to me but I didn't need them"

Well, if he didn't need them from Welger, how come he got them from Welger? And if he got them from Welger, how come he had to lie about it if there was no significance to it?

So you have to weigh his testimony.

Here is Mr. Barney, all the care in the world to get evidence in this case, had a tape, a meeting, had a conversation, ask him questions. Ask Hasenstab questions which are designed to get an admission. We want you to get him to say something to hurt himself , to say that he got money in the past. So, go out, Mr. Undercover Agent, go out, going to help yourself, get Hasenstab to admit. Wear the wire recorder. Take all of those pains and all of that care.

They do it twice. They do it twice. They come in here and you see what the government has on the floor, wires around the room. Money for ear phones, tape recorders, all the money, taxpayers' money, they've got to spend with th FBI agents, Lynch and Marshon. If Barney had in fact not

not Agents Lynch and Marshon, if he had not told them that he received the prices from Welger, if he had not told them that he would recommend -- he was the person who recommended Barney's company, why don't the agents go on the stand and tell you that?

The government can bring them in and put them on, with all the money that's spent in this case. Why don't they do it? It would be nice to hear from the federal agents in the case, wouldn't it? They are government agents. They are on salary. It doesn't cost any more to put them up here and tell you that Barney in fact never said such and such.

They interviewed him. Barney said, "I think they took it down on tape."

MR. KINGHAM: I'm sorry, your Honor, I must object. There are obviously evidentiary problems here of which the Court has got to be aware under the circumstances of the cross examination of Mr. Barney, and I object to the reference in summation.

THE COURT: This is argument, ladies and gentlemen, it is your judgment of the facts as presented here which will govern in this case.

The government has the burden of proving the case beyond a reasonable doubt. If you find that it has met the burden, you will act accordingly. If they have not, you will also act accordingly.

I will charge you further on the law when I present my charge to you; but do remember, the fact in this case are what you saw and what you heard and your interpretation of those facts will govern.

You may proceed, Counsel.

MR. FRIEDMAN: Thank you, Judge.

So, I argue to you, I suggest to you, I suggest you can infer, and I suggest you have been able to listen to the evidence and you have been able to weigh the evidence, and you can ask yourselves about the lack of evidence, and I say to you where are the agents to testify if in fact Barney was telling the truth? And if you find Barney has not been telling the truth, when you weigh his credibility and you apply the instructions that the Court has given you, you will see that you have the opportunity, if you choose, in this case, to reject that testimony. And if you do, you will have the opportunity to say to yourselves, "Well, there is at least one reason in this case by which I have a reasonable doubt." At least one reason.

On the issue of credibility, I think it is very interesting, the government should say Mr. Friedman's witness, Mr. Welger. Mr. Welger has about as much to do with this case as a defense witness as the man in the moon.

He is here under subpoena. Sitting over there, right behind our present stenographer who is so ably taking down my remarks, is his lawyer.

MR. KINGHAM: I object, your Honor.

THE COURT: Yes. I agree.

MR. KINGHAM: He was a defense witness.

THE COURT: You called him, period. It's up to the jury to accept or reject his testimony.

MR. FRIEDMAN: All right, Judge, and I would appreciate if your Honor doesn't shout at me.

THE COURT: I'm not shouting.

MR. FRIEDMAN: Well, it seems that way to me, Judge, and I don't think there is any call for it. I can hear quite well and I say that most respectfully.

THE COURT: I am speaking no louder than you have been speaking for the past ten minutes.

You may proceed, sir.

MR. FRIEDMAN: Thank you, Judge.

Mr. Welger was sitting there with his lawyer. And on the important questions to determine his function, his lawyer stands up and invokes on his behalf his Constitutional rights, which is his right.

MR. KINGHAM: Your Honor, I would ask the jury be instructed to disregard this.

THE COURT: No, I will let the jury hear the argument.

MR. FRIEDMAN: It is his right but he doesn't answer the questions.

And so that's Mr. Welger, Mr. Welger in reference to whom Mr. Barney had questions put to him. And it is Mr. Welger who Mr. Barney, you know, was asked questions concerning whether or not he had gotten prices from him, and Mr. Barney whose name on certain contracts some of the later ones I think, in substance, "Don't release the goods without Welger's okay."

As I come to the end of my remarks, members of the jury, I cannot emphasize too strongly the issue for you to determine and weigh as jurors in this case, whether or not you think there has been a mail fraud or a wire fraud through the use of the telephone or a conpsiracy to violate those statutes.

You know in weighing the credibility of witnesses and making a determination in this case, as I have emphasized, you have listened to Mr. Barney, and I ask you, because I think I forgot to tell you that, in weighing his testimony you remember he said that as he testifies he is testifying having pleaded guilty to a mail fraud count. I think he said a conspiracy count in some case and there is a five-year exposure on the mail fraud case and conspiracy case and you can weigh whether or not you want to accept his testimony as being credible based upon that pressure.

In this case, members of the jury, the evidence has also shown through the cross examination, through the cross examination and testimony of some of these different witnesses, evidence that Mr. Hasenstab is married, that he worked for the company for many years, that he resigned his job. All facts in this case.

And now you have to make a determination on the three counts which are going to be submitted to you for your decision:

The mail fraud count, wire fraud count, and the conspiracy count. You have to make a determination on all of the evidence in this case and you have to make a determination upon the facts, and upon the facts as youlisten to them you must come to the conclusion, I emphasize it again for the third time, your conclusion as to whether or not you think there was a violation of the mail fraud statute, the wire fraud statute, or conspiracy to violate those statutes.

Each juror in this case has his own vote. I ask each of you to analyze the evidence accordingly. If you as a juror have a reasonable doubt in this case, then under those circumstances, after weighing all of the evidence, if you maintain steadfastly to your conviction that there is a reasonable doubt by reason of the lack of credibility of witnesses, or in the belief that the facts in general do not show a violation of the mail fraud statute or the wire fraud statute or conspiracy, a knowing conspiracy to violate those statutes, if you as a juror feel that way, and you hold to the integrity of your vote, then you have to say, not guilty, and I ask each of you in this case to weigh the evidence accordingly and to find by your vote that the government has not established its burden of proof in reference to these charges of mail fraud, wire fraud, and conspiracy to violate those statutes.

Lastly, if I have said or done anything in the course of this trial, if there has been anything by my manner or my presentation which has offended you, you know it has no part in this case.

Mr. Kingham has an opportunity as has been indicated, to rebut. Those are our rules and I have no opportuni after he speaks, so I have to ask you to say to yourselves after you hear him speak, well what would the other side have to say?

I thank you very much for your kind attention, and I trust that you will hold to your verdict if you believe the government has not established guilt beyond a reasonable doubt and maintain the integrity of that verdict and bring in a verdict of not guilty.

THE COURT: Thank you, Mr. Friedman.

MR. KINGHAM: Let me ask you a question:

Can you imagine that two grown men, Mr. Barney, Mr. Hasenstab, would actually sit down one day in Charley Brown's and say to one another in words or any other way, "Let's get together a conspiracy. Let's set out to violate Section 1341 of Title 18 of the United States Code. Let's set out to violate Section 1343. Let's do a mail fraud. Let's do a wire fraud. Let's be criminals."

People just don't do that, ladies and gentlemen. That's not life. And it is not business. And you will hear when Judge Ward instructs you, exactly how ridiculous that defense argument is, because I suggest that you will hear from Judge Ward the definition of exactly what kind of intent the defendant has to give, what kind of knowledge he has to give. And frankly, if you believe that he has to sit down and figure out in advance what law he is going to violate, we would never have any prosecutions; would we?

And we would never catch anyone.

George Barney's credibility, as predicted, Mr. Friedman has gone into Mr. Barney's credibility. Well, I ask you this: Who is the government supposed to use as a witness here? Who was in the scheme with Mr. Hasenstab? Who was there? Who met with him? Who paid him off? Who used to go to the Hamilton House with him and pay him off in the men's room long before the government ever got involved? George Barney.

And I ask you this:

Are you to expect that after Mr. Barney's arrested in November of 1976 and tells the government for the first time about the corruption that Mr. Hasenstab is involved in, the government is supposed to ignore that? We are not supposed to ask Mr. Barney to wear a tape recorder and go out and talk to the man he's been paying off? Not supposed to find out about it? Is that how you want your government to act?

And it is Mr. Hasenstab's government, too.

Imagine, if you will, and I'm afraid with the defense case, the defense argument here I am going to have to ask you to do some imagining -- but imagine, if you will, that we wouldn't be here if on the tape recordings, which as the Judge has and will instruct you are perfectly lawful, if on the tape recordings Mr. Hasenstab had said, "George, money, what are you talking about? Contracts, fixing prices? No, George. I'm going to turn you in to Pan Am."

Did you hear that on the tape? Did you hear that from Mr. Barney's testimony? Or doesn't the tape confirm the very fact that you are going to find here, that these men together for years had a payoff scheme, a kickback scheme, which resulted in about $50,000 in cash going into Mr. Hasenstab's pocket.

(Continued on the next page.)

Is George Barney getting a bath here? Is he walking away clean? He has pleaded guilty to two felony counts which to him means as he said a ten-year jail exposure. He could go to jail for ten years. Of course he doesn't want to go to jail. Who wants to go to jail and of course he is testifying because he wants to help himself.

Who wouldn't.

I ask you this: Do you think that he is going to risk taking the oath before Judge Ward, perjuring himself, lying to you and then expect a break from Judge Owen. That just doesn't make sense.

Now, Mr. Friedman makes a big deal in his argument about the salaries of FBI agents and how much it costs and isn't it nice that the government can go out and tape record people.

You know, that's easy, isn't it? That's easy to argue. It is easy to put the government on trial. It is easy to put Saul Welger on trial. It is easy to put Nick Di Napoli on trial and it is real easy to put George Barney on trial because he is a confessed criminal. That's easy.

But you know I am sure you remember what an octopus does when he is cornered. He squirts ink and he runs away. And that argument, ladies and gentlemen, is just so much ink in the hopes that your view will be blocked, that you won't be able to see behind it. You worry about George Barney, Nick Di Napoli, Saul Welger and not Bill Hasenstab. But you are not going to just do that.

Let me close. You have been very patient, very attentive. Lew me say this: Mr. Friedman suggested to you in his argument that Mr. Barney was sent out by the government to get admissions from Mr. Hasenstab; that Mr. Barney went to the Hamilton House on those two occasions to get Mr. Hasenstab to say things which would confirm the scheme. You know, it may be true to a certain extent because as you know, George Barney had already told the government about the scheme and, as you heard from cross examination, the government wanted evidence against Mr. Hasenstab. We have gone into that. Of course the government wanted evidence against Mr. Hasenstab. That's what this case is all about. It is a prosecution, but listen to the tape recordings and listen on there is anybody forced the conversation and listen on there if anybody forced Mr. Hasenstab to take a thousand dollars and listen on there if anybody forced Mr. Hasentab to say, "George, when are you going to get back to the 3,000? I was getting used to the life style."

These men are friendly on that tape recording. Do you hear George Barney squeezing him, forcing him to do anything, forcing admissions? No, it is two men having a business lunch, two men having a corrupt business lunch.

The only trap, ladies and gentlemen, that Mr. Hasenstab is caught in is his own. He is caught in his own scheme. He is caught in his own words at the Hamilton House. And he is caught by his acceptance of $50,000 in cash from George Barney and you are not going to let him get away with it.

THE COURT: Thank you, Mr. Kingham.

Ladies and gentlemen, we will take a ten-minute recess and then you will return to hear my instructions on the law.

Please do not discuss the case among yourselves even at this late hour. Keep an open mind on all facets of the case until the case has been concluded and given to you following my charge.

The jury is excused for a ten-minute recess.

(The jury left the courtroom)

THE COURT: I understand that Mr. Vega has arrived. I have had him placed in the robing room, separate and apart from the other jurors. I will bring him out in just one moment.

Off the record.

(Discussion off the record.)

jbhh 4

(Jury present)

THE CLERK: The Court is about to charge the jury. Any spectators wishing to leave the courtroom, do so now or remain seated until the Court's charge.

Marshal, please lock the door.

THE COURT: Ladies and gentlemen:

We come now to that stage of the case where you and I do our part in the administration of justice. Your role is to pass upon and decide the factual issues. As I said earlier in the case you are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence and you draw such reasonable inferences as may be warranted by the testimony and by the exhibits in the case.

My function is to instruct you as to the law applicable to the case. It is your duty to accept the law as I state it to you in these instructions and to apply the law to the facts as you find them.

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel for the government or for the defendant may have said with respect to matters in evidence or as to any factual matter, whether stated in a question, in argument, or in their summations is not to be substituted for your own independent recollection.

Moreover, the statements of counsel do not constitute evidence. So, too, anything I may have said during the trial or may refer to during the course of these instructions with respect to any matter in evidence or as to any factual matter is not to be taken in lieu of your own recollection.

Should you require assistance with regard to any testimony or with regard to any portion of my charge, you may request that any portion of the testimony or any portion of my charge be read back to you. You will then be brought back into the courtroom and the portion of the testimony or the portion of the charge which you request will be read to you. In the same vein should you wish to see any exhibits which are in evidence or should you wish to see the indictment, you may call for any of these things and they will be sent in to the jury room.

William Hasenstab has pleaded not guilty. Therefore the government has the burden of proving the charges against him beyond a reasonable doubt. It is a burden that never shifts and remains on the government throughout the entire trial. A defendant under our system of law does not have to prove his innocence. On the contrary, he is presumed to be innocent of the charges contained in the indictment. The presumption of innocence was in his favor at the start of the trial and continues in his favor throughout the trial. It is removed only if and when you are satisfied that the government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt.

What is a reasonable doubt? A reasonable doubt is such a doubt as would cause prudent men and women to hesitate to act in matters of importance to themselves. It is a doubt which a reasonably prudent person has after carefully weighing all the evidence. A reasonable doubt is one which appeals to your reason, your judgment, your common sense and your experience.

A reasonable doubt is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for the defendant or for his family. Vague, speculative or imaginary qualms or misgivings are not reasonable doubts. It is not necessary for the government to prove the guilt of the defendant to a mathematical certainty or beyond all possible doubt. If that were the rule, few men or women, however guilty they might be, would be convicted.

The reason is that in this world of ours, it is practically impossible for a person to be absolutely certain of any controverted fact which by its nature is not susceptible of mathematical certainty. In consequence the law is such that in a criminal case it is enough that a defendant's guilt be established beyond a reasonable doubt, not beyond all doubt.

As I told you when you were being selected, an indictment is not evidence. It is a technique or method by which persons accused by a grand jury of crimes are brought into court and then their guilt or innocence is determined by a trial jury such as you are. An indictment has no evidentiary value. It does not constitute proof or evidence. It is merely an accusation, a charge.

The indictment in this case contains three counts, each of which charges a separate crime. Each must be considered separately.

The indictment charges the defendant, William Hasenstab, in Count 1, with mail fraud; in Count 2, with wire fraud; and, in Count 3, with conspiracy to commit mail fraud and wire fraud. Specifically, the indictment charges that Mr. Hasenstab, a supervisor in the office and passenger service support department of Pan American

World Airways received cash kickbacks in connection with Pan American's purchase of computer paper, stock forms and other paper products and that Mr. Hasenstab, in furtherance of a scheme to defraud Pan American of his honest services as its employee caused the mails and telephone to be used.

In addition, Mr. Hasenstab was charged with conspiring with one of the Pan American paper suppliers, a company called Tabulating Stock Forms, Inc., of which George Barney was president, to commit mail fraud and wire fraud.

The indictment reads as follows:

Count One. The Grand Jury charges:

1. From in or about 1968 up to and including the date of the filing of this indictment -- which I would note was July 5, 1977 -- in the Southern District of New York and elsewhere, William E. Hasenstab, the defendant, unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud Pan American World Airways, Inc. ('Pan American'), and its shareholders, officers and directors of his honest and faithful services as their employee and of more than $45,000 of their money and property by means of false and fraudulent pretenses, representations and

promises and for the purpose of executing such scheme and artifice and attempting so to do, did place and cause to be placed in post offices and authorized depositories for mail matter and did cause to be delivered by mail according to the direction thereon certain mail matters to be sent and delivered by the United States Postal Service.

2. It was part of said scheme to defraud that the defendant William E. Hasenstab would and did utilize his official position as Supervisor of the Office and Passenger Service Support Department of Pan American to select in an unfair and corrupt manner particular suppliers from whom Pan American purchased computer paper, commercial forms and other paper products.

3. It was further a part of said scheme to defraud that during the period of 1968 through 1976 the defendant William E. Hasenstab arranged to receive secret cash kickbacks from the President of Tabulating Stock Forms, Inc., in connection with purchases by Pan American of computer paper, stock forms and other paper products from Tabulating Stock Forms, Inc.

4. It was further a part of said scheme to defraud that during the period 1968 through 1976 the defendant William E. Hasenstab received secret cash

kickbacks in excess of $45,000 on purchases by Pan American from Tabulating Stock Forms, Inc.

5. It was further a part of said scheme to defraud that the defendant William E. Hasenstab would arrange periodic meetings with the President of Tabulating Stock Forms at Charlie Brown's Ale & Chop House in the Pan American Building, New York, New York as well as at JFK International Airport, Queens, New York and at Hamilton House, Brooklyn, New York, for the purpose of receiving secret cash kickbacks.

6. It was further a part of said scheme to defraud that the defendant William E. Hasenstab deliberately rigged the bidding on certain commercial paper contracts in order to facilitate directing the business to Tabulating Stock Forms, Inc. in return for secret cash kickbacks.

7. It was further a part of said scheme to defraud that the defendant William E. Hasenstab deliberately concealed from and failed to disclose to the officers and management of Pan American the aforementioned secret kickbacks and submitted false and fraudulent responses to several Pan American audit committee inquiries concerning "conflicts of intrest and violations of trust" in which he falsely denied soliciting or accepting

personal benefits from any person engaged in business with Pan American. (Title 18, United States Code, Sections 1341 and 2.)

COUNT TWO

The Grand Jury further charges:

1. From in or about 1968 up to and including the date of the filing of this indictment, in the Southern District of New York and elsehwere, William E. Hasenstab, the defendant, unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud Pan American World Airways, Inc., its shareholders officers and directors, by means of false and fraudulent pretenses, representations and promises and for the purpose of executing said scheme and artifice to defraud and attempting so to do, did transmit and cause to be transmitted by means of wire communications in interstate commerce, signals and sounds, to wit, telephone calls.

2. The allegations contained in Count One of this indictment are repeated and realleged as though fully set forth herein as constituting and describing the means by which the defendant committed the offense charged in Count Two of this indictment.

(Title 18, United States Code, Sections 1343 and 2.

THE COURT: I will defer reading Count 3 and will turn back to it later.

Counts 1 and 2 which I have just read to you, charge William Hasenstab with having violated Title 18, United States Code, Sections 1341 and 1343 respectively. Section 1341 provides in part "Whoever having devised or intending to devise any scheme or artifice to defraud and for obtaining money or property by means of false or fraudulent pretenses, representations or promises" -- I skip some language which is not relevant here -- "for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter any matter or thing whatever to be sent or delivered by the postal service or takes or receives therefrom any such matter or thing or knowingly causes to be delivered by mail, acccording to the directions thereon" -- and I skip some material which is not pertinent -- "any such matter or thing" -- and now I interpolate -- commits a crime.

Turning to the Section 1343, Section 1343 provides in part: "Whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce any writings, signs, signals, pictures or sounds for the purpose of executing such a scheme or artifice" -- and now I interpolate -- commits a crime.

In order to find Mr. Hasenstab guilty under Count 1 or Count 2, the government must establish beyond a reasonable doubt the following three essential elements.

First: that a scheme or artifice to defraud or to obtain money by false or fraudulent pretenses, representations or promises as alleged in the indictment was devised by the defendant or someone with whom the defendant acted.

Second. That the defendant knowingly and wilfully participated in the scheme or artifice to defraud with knowledge of its fraudulent nature and with the intent to defraud or that the defendant knowingly and intentionally aided and abetted others to do so and, third, that the scheme or artifice to defraud involved the use of the mails under Count 1 or the use of interstate wire facilities-- in this case, the telephone -- under Count 2.

Turning now to the three elements. The first element of the mail and wire fraud consists of the existence of a scheme or artifice to defraud. A scheme or artifice to defraud is merely a plan to obtain money or property or some advantage or thing of value by trick or deceit.

Turning to the second of the three essential elements with reference to Counts 1 and 2: The second essential element which you must find beyond a reasonable doubt before you may convict Mr. Hasenstab of either mail or wire fraud is that he acted knowingly and wilfully in his participation in a scheme or artifice to defraud with the intent to defraud.

An act is done knowingly, ladies and gentlemen, if it is done voluntarily and purposely with an understanding of the nature of the act and not because of mistake or accident or negligence or some other innocent reason.

We say an act is wilful if, in addition to being knowing in its performance it is done deliberately. To show that somebody acted wilfully in this sense it is not required to show that the defendant in addition to knowing what he or she was doing knew that he or she was violating some particular law. The person does not need to know the law at all. However, any defendant before he or she may be convicted must be shown to have had a specific intent to defraud. That means that the person must have engaged or participated in knowing and deliberate deception. The person must have participated in the knowing and deliberate making of false statements or knowing and deliberate creation of material omissions with an intention to deceive for the purpose of causing financial loss to others or obtaining directly or indirectly financial gain for himself or herself.

Now, all this talk about knowledge and intent directs you to be concerned with the subject of people's states of mind. What is in the head.

This is a subject with which we regularly deal in real life as well as in the courthouse but it is a subject, as you know, of some subtlety and complexity for, after all, you cannot look into a person's mind or into his head to see what he or she is thinking. Knowledge, guilty knowledge, the intent to defraud, are things respecting which we cannot normally rely on so-called direct evidence -- that is, what we see or hear with our own senses.

We cannot rely, normally, on so-called direct evidence when we are trying to determine whether a person has or had such knowledge or such intent. On occasion, of course, we do have direct evidence. A person may make a statement or write a letter saying this is what I know, this is what I intend or this is what I intended or this is what I didn't know. All of that, things you could see with your eyes if it was a letter, hear with your ears, if it was a statement, is direct evidence. However, the fact that there is direct evidence does not necessarily mean that it is the best evidence because people do not always write or speak the truth about what they think or intend.

But apart from such direct evidence, you will consider all the circumstantial evidence in the case in deciding whether the alleged intent to defraud has been made out with respect to Mr. Hasenstab. The existence or non-existence of guilty knowledge is something commonly to be inferred from what I have just called circumstantial evidence as distinguished from direct evidence.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind.

Stated somewhat differently, circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to a conclusion that those facts exist which are sought to be established.

Circumstantial evidence is of no less value than direct evidence, for in either case, whether the evidence be direct or circumstantial or a combination of both, you must be convinced beyond a reasonable doubt of the guilt of the defendant.

Let us take one simple example, one which is often used in this courthouse to illustrate what is meant by circumstantial evidence.

Assume, as was the case, that when you entered the courthouse this morning the sun was shining outside and it was a clear day. There were no clouds in the sky, there was no rain.

Assume that the blinds which are before you have been drawn and that heavy drapes were placed over the blinds, and that the drapes are closed so that you cannot look outside.

Assume that you are sitting in your jury box and despite the fact that it was sunny and dry when you entered the building, someone walks through the courtroom door with an umbrella dripping water, followed in a short time by a person wearing a raincoat and the raincoat is dripping water.

Taking your assumptions, you cannot look out the windows to see directly whether it is raining or not, and if you are asked, "Is it raining?" you cannot say that you know this of your own knowledge. But certainly upon the combination of facts as I have given them to you, even though when you entered the courthouse this morning it was not raining outside, it would be reasonable and logical for you to conclude that it is raining now .

That's about all there is to circumstantial evidence. You interpret on the basis of reason and experience from an established fact the existence of some further fact.

What do you consider when you try to figure out whether somebody acted purposely, intentionally, with knowledge of one thing or another? Well, you do this all the time in real life. You consider who the person is, what the circumstances are, the level so far as you know it of the person's intelligence and sophistication, the means of information available to him or at his disposal, the plausibility of supposing a person acted deliberately or not deliberately.

You consider in short all the circumstances and put them together in the whole setting of the case, and you decide from all of the evidence with respect to the defendant whether or not he acted knowingly and wilfully on the occasions leading to this prosecution.

In a financial setting, which is what we have here, you may find more specific things to consider in determining knowledge and wilfulness, so you will consider things that I will mention to you just illustratively, and then add to them all the things that you know from all the diverse experiences you have had in deciding this question of criminal intent.

The kind of wrongful purpose that is charged throughout this case may be refuted or partly discounted by evidence,to the extent you find there is such evidence,that the actions in question were taken openly and normally, with full disclosure, with clear and standard records, and in general in a business-style of proceeding that is inconsistent with the kind of wrongful, fraudulent, deceptive kinds of purpose charged in this indictment and claimed by the government to have been proven.

By the same token, if you find that normal business routines were not followed, and that the true facts were concealed by means of false documentation, such facts may indicate a wilful intent to deceive or mislead. Indeed, you may find that even otherwise proper business activities may be misused for a fraudulent purpose.

So I say in sum that on the second element under Counts 1 and 2, that is, the element of whether the defendant acted knowingly, wilfully and with fraudulent intent, it is for you finally to review and put together all of the circumstances in deciding whether or not that element has been established by the government beyond a reasonable doubt with respect to Mr. Hasenstab.

I said that there were three elements in Counts 1 and 2. I will turn now to the third essential element of each count.

Count 1 rests on the mail fraud statute, the pertinent portions of which I read to you a few moments ago.

To satisfy the requirements of that statute and the third essential element of Count 1, the proof must show that there was at least one use of the mails which was for the purpose of furthering or executing the alleged fraud.

I will tell you in that connection that it is not necessary for the government to have proved that Mr. Hasensta contemplated the use of the mails or that particular use of the mails is an essential element in a scheme. At the same time, it would not be sufficient if the mails merely came to be used incidentally or coincidentally as a result of the fraudulent scheme.

I instruct you that to satisfy this essential element, the proof must show that the use of the mails was intended in the sense that it was reasonably foreseeable as an incident that would occur in furtherance of execution or continuation of the scheme to defraud.

I have told you that you do not have to find for this purpose that Mr. Hasenstab himself actually mailed an item to constitute this aspect of the proof. You must find, however, before you may convict the defendant, that if he did not personally participate in the use of the mails, he at least in the sense of the indictment and statute caused the mails to be used.

In this sense, one can cause the use of the mails if he either knows that the use of the mails will follow from the working out of the scheme in the ordinary course of business, or if such use of that mailing is reasonably foreseeable to the defendant as part of the evidence covered by the continuation and the elaboration of the fraudulent scheme.

The mailed matter for this purpose does not need itself to disclose a fraudulent representation, and it is not necessary that the addressee be an intended victim of the scheme.

The government in this connection charges that Mr. Hasenstab caused mailings by Pan American and by George Barney that are claimed to satisfy this third essential element under Count 1. Specifically, the government contends that the invoices mailed to Pan American by Mr. Barney constitute such mailings; and also, that the mailing of checks by Pan American as payment for these invoices were such mailings.

I instruct you that you must find at least one such mailing under the instructions I have just given you before you may convict on Count 1.

Similar principles apply, though we are dealing with a different technology, a different means of communicatio to the wire fraud charge in Count 2.

Again, to establish the third element of the charge contained in Count 2, the government must prove that f the purpose of executing the fraudulent scheme or artifice, the defendant caused the transmission of sounds or signals by wire communications in interstate commerce or caused somebody else to make such use of interstate wire facilities.

I instruct you, I'm sure you know anyway, that interstate telephone calls constitute the kinds and uses of wire communication to which this statute and this count are directed.

Once again, the use of the wire communication must, in order to satisfy this element, must be for the purpose of furthering the alleged fraud.

Again, the defendant need not himself have directly participated in the communication either as the caller or the person receiving the call. But he must at least either have known that the use of wire communications would follow in the ordinary course of business, or that this was reasonably foreseeable in the continuation and the carrying out of the complicated steps of the allegedly fraudulent scheme.

Further, I instruct you that you must find that at least one mailing or at least one telephone call occurred after July 5, 1972, since mailings or telephone calls before that date would be barred by the statute of limitations.

Because the essence of the crimes charged is the scheme to defraud, and not the result of that scheme, I instruct you that it is not necessary that the intended victim suffer any loss whatsoever. The question is did the defendant wilfully and knowingly devise or enter into a scheme to defraud and to obtain money and property in which the mails and interstate telephone facilities were used to further the scheme.

Here the government contends that the scheme did in fact succeed, that is, the government charges that Pan American was defrauded of the honest and faithful performance of Mr. Hasenstab's duties as its employee.

However, whether or not the scheme succeeded is of no consequence in your determination as to whether it existed and whether the defendant participated in it.

You will recall that when I read Counts 1 and 2 I mentioned in addition to Sections 1341 and 1343, Title 18, United States Code, Section 2.

Section 2 is the so-called aiding and abetting statute. I instruct you that under Counts 1 and 2 Mr. Hasenstab may be found guilty if all the essential elements are shown, even though he did not himself commit the wrongful act directly. He could be found guilty if beyond a reasonable doubt you find that he has served as what is known to the law as an aider and abettor. This is what Section 2 of Title 18, United States Code is all about.

Now I will read Section 2(a):

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

The person is punishable if he did it directly himself.

I turn to Section b of 18 USC, Section 2(b):

"Whoever wilfully causes an act to be done which if indirectly performed by him or another would be an offense against the United States, is punishable as a principal."

Thus, under that statute and under this indictment, if the essential elements are made out, it is not necessary to show that the defendant himself physically and directly committed the act or caused the omission in question, if instead you find that he aided and abetted the act or omission, and that he did so knowingly and wilfully.

Now, that means of course that you cannot find anybody guilty as an aider and abettor unless you find that the offense was actually committed. You have to start with that, a finding that the offense was actually committed.

You cannot aid and abet the commission of an offense when the offense never happened. More centrally, what do we mean by aider and abettor and how do you decide whether somebody is that? You must find more than mere knowledge on the part of the person that a crime is being committed.

A mere spectator is not a participant and not an aider and abettor. To decide whether the defendant aided and abetted the commission of an offense, you should ask yourselves these questions:

Did he wilfully associate himself with the criminal venture?

Did he wilfully participate in it as something that he wanted to bring about, even though he did not accomplish the criminal misconduct directly or personally?

Did he knowingly and wilfully by his own action intend to make that criminal enterprise succeed?

If he did, then you may find that person you are considering was an aider and abettor. Otherwise, you may not.

We turn now to the conspiracy charge.

The defendant is charged in Count 3 with violating Section 371 of Title 18, United States Code, and I will read Count 3 at this time:

"The grand jury further charges, one, from in or about 1968 and continuously thereafter up to and including the date of the filing of this indictment in the Southern District of New York and elsewhere, William E. Hasenstab, the defendant, and Tabulating Stock Forms, Inc., named herein as a co-conspirator but not as a defendant, unlawfully, wilfully, and knowingly did combine, conspire, confederate, and agree together and with each other to commit certain offenses against the United States of America, to wit, violations of Sections 1341 and 1343 of Title 18, United States Code."

"2. It was a part of said conspiracy that the defendant, William E. Hasenstab and co-conspirator Tabulating Stock Forms, Inc., would and did devise and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, and for the purpose of executing said scheme and artifice to defraud and attempting to do so would and did place and cause to be placed in most offices and authorized depositories for mail matter, and would and did cause to be delivered by mail according to the direction thereon, certain mail matter to be sent and delivered by the United States Postal Service.

"3. It was further a part of said conspiracy that the defendant William E. Hasenstab and co-conspirator Tabulating Stock Forms, Inc., would and did devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, and for the purpose of executing said scheme and artifice and attempting so to do, would and did transmit and cause to be transmitted by means of wire communications in interstate commerce, signals and sounds, to wit, telephone calls.

"4. The allegations contained in Count 1 of this indictment are repeated and re-alleged as though fully set forth herein, as constituting and describing the meetings by which the defendant and co-conspirator committed the offense charged in Count 3 of this indictment."

There follow four alleged overt acts which are alleged to have been in furtherance of the conspiracy and to effect its objects. I will return to those overt acts in a few moments.

Count 3 charges, as I have indicated, a violation of Title 18, United States Code, Section 371. That section provides in part as follows:

"If two or more person conspire" -- now I will skip some words which are not pertinent -- "to commit any offense against the United States" -- I will skip a few more words which are not relevant -- "and any one or more of such persons do any act to effect the object of the conspiracy, these persons have committed a crime."

In order to convict Mr. Hasenstab under Count 3, you must find each of the following three elements has been proved beyond a reasonable doubt:

First, that the conspiracy charged in Count 3 did in fact exist, that is, that William Hasenstab and at least one other person agreed to violate the law against using the mails and the telephone to defraud at or about the time charged in the indictment, which is some time between 1968 and July 5, 1977, the date of the filing of the indictment.

Second, that William Hasenstab knowingly and wilfully associated himself with the conspiracy.

And third, that at least one of the co-conspirators committed at least one of the overt acts set forth in the indictment.

What is a conspiracy? A conspiracy is a combination or agreement of two or more persons by concerted action to accomplish a criminal or unlawful purpose or some purpose not in itself criminal or unlawful. By criminal or unlawful, it means the gist of the crime of conspiracy, is the unlawful combination or agreement to violate the law.

Whether or not the persons charged in the indictment accomplished what it is alleged they conspired to do is immaterial to the question of their guilt or innocence. A conspiracy has sometimes been called a partnership in criminal purpose in which each member becomes the agent of every other member.

However, to establish a conspiracy, the government is not required to show that two or more persons sat around a table and entered into a solemn compact orally or in writing, stating that they have formed a conspiracy to violate the law, setting forth details of the plans, the means by which the unlawful project is to be carried out, or the part to be played by each conspirator. Indeed, it would be extraordinary if there were such a formal document or specific form of agreement. Your common sense will tell you that when people in fact undertake to enter into a criminal conspiracy, much is left to unexpressed understanding.

Conspirators do not usually reduce their agreements to writing or acknowledge them before a Notary Public, nor do they publicly broadcast their plans. From its very nature, a conspiracy is almost always characterized by secrecy rendering detection difficult.

It is not required that you find that each and every one of the alleged co-conspirators joined in the conspiracy. Thus it is sufficient if two or more persons in any way through any contrivance, impliedly or tacitly, come to a common understanding to violate the law.

Express language or specific words are not required to indicate assent or attachment to a conspiracy. To determine whether there has been an unlawful agreement, you may judge acts and conduct of the alleged members of the conspiracy which are done to carry out an apparently criminal purpose.

The old adage "Actions speak louder than words" is applicable here.

Usually, the only evidence available is that of disconnected acts on the part of the alleged individual conspirators which acts, however, when taken together in connection with each other and with the reasonable inferences flowing from such facts, show a conspiracy or agreement to secure a particular result as satisfactorily and conclusively as more direct proof.

If upon such consideration of all the evidence, both direct and circumstantial, you find beyond a reasonable doubt that the minds of at least two of the alleged conspirators met in an understanding way, that they agreed, as I have explained a conspiratorial agreement to you, to work together in furtherance of the unlawful scheme alleged in the indictment, then proof of the conspiracy is established.

Turning to the second element, once you have found that the government has proved beyond a reasonable doubt that the conspiracy charged in Count 3 existed, you mus ask yourselves who its members were.

In deciding whether or not Mr.Hasenstab was a member of the conspiracy, you should consider whether on all the evidence he knowingly and purposely entered the conspirac

In determining whether the defendant became a member of the conspiracy, you must determine not only whether he participated in it but whether he did so with knowledge of its unlawful purpose. Did he join with awareness of at least one of the illegal aims and purposes of the conspiracy?

When I say "join the conspiracy," I don't mean that the defendant had to file an application for membership. Before one can be found to be a conspirator, however, he must knowingly join in the venture. He must promote it or have a stake in its outcome.

In the vernacular, he must be in on the scheme, he must be in on the plan.

As I told you a few moments ago, knowledge is a matter of inference from facts involved. It is not necessary that a defendant be fully informed as to all the details of the scope of the conspiracy. In order to justify any inference of knowledge, a defendant need not know the full extent of the conspiracy and all of its activities and actors.

I want to caution you that mere association with one or more of the conspirators does not automatically make one a member of the conspiracy, nor is knowledge without participation sufficient. What is necessary is that the defendant participate with knowledge of at least some of the purposes of the conspiracy, and with the intent to aid in the accomplishment of those unlawful ends.

Once you have found the conspiracy to exist and the defendant to have knowingly participated in it, the extent of his participation has no bearing on his guilt or innocence. The guilt ofthe conspirator is not measured by the extent or the duration of his participation. Even if he participated in it to a degree more limited than that of other co-conspirators, he is equally guilty so long as he was in fact a conspirator.

When people enter into a conspiracy to accomplish an unlawful end, they become agents for one another in carrying out the conspiracy. Therefore, the acts or declarations of a conspirator in the course of the conspiracy and in furtherance of the common purpose are considered to be the acts of all conspirators, and all are responsible for such acts and declarations.

In this connection, you may find that George Barney and his company, Tabulating Forms, are co-conspirators in Count 3. This means that you may consider their statement and acts in furtherance of the conspiracy as to which you heard testimony as evidence against William Hasenstab if you find him to have been a member of the conspiracy.

Accordingly, if you find in accordance with these instructions that some or all of the alleged co-conspirators were participants in a conspiracy, then acts done and statements and declarations made in furtherance of the conspiracy by the persons found by you to have been members of the conspiracy may be considered against Mr. Hasenstab if you fin he was a member, even though such acts or declarations were made in his absence or without his knowledge.

It is important to note that this principle applies only to the facts and declarations done or made during the continuance of the conspiracy and in furtherance of it; that is, to carry out an unlawful objective or purpose of the conspiracy. It does not apply to acts or declarations which do not have those characteristics.

As I have already mentioned, the third essential element of the crime of conspiracy is that at least one overt act to carry out the object of the conspiracy be committed by at least one of the co-conspirators.

An overt act is any step, action, or conduct which is taken to achieve or further the objective of the conspiracy.

I said a few moments ago that I would read the overt acts charged in this indictment. I will do so at this time.

The overt acts charged in this indictment read as follows:

"In furtherance of said conspiracy and to effect the objects thereof, the defendant did commit the following overt acts among others in the Southern District of New York and elsewhere:

"1. In or about December 1973 the defendant William E. Hasenstab agreed to direct certain Pan American purchases of paper products to Tabulating Stock Forms, Inc. in return for secret cash kickbacks.

"2. On or about May 24, 1976, the defendant William E. Hasenstab caused a Pan American check in the amount of $9,182.22 to be transmitted to Tabulating Stock Forms, Inc. at 115 Broadway, New York, New York.

"3. On or about July 26, 1976, the defendant William E. Hasenstab caused a check for $17,799.08 to be transmitted to Tabulating Stock Forms, Inc., at 115

Broadway, New York, New York.

"4. On or about February 22, 1976, the defendant William E. Hasenstab transmitted a statement to the Pan American audit committee falsely denying any knowledge of his solicitation and receipt of cash kickbacks from 'a person engaged in business with the company.'"

As I said previously, this is charged as a violation of Title 18, United States Code, Section 371.

Obviously for people to have conversations or prepare and mail documents, checks or letters, is not in and of itself criminal conduct. But when, as the government charges, and if you so find, the purpose of that activity was to accomplish a fraud in furtherance of which the mails were used, then those activities lose their innocent characteristics and become overt acts to further the purpose of an illegal enterprise.

It is not necessary for the government to prove that each member of the conspiracy committed or participated in the particular overt act since the act of any one done in furtherance of the conspiracy becomes the act of all the other members.

Also, the government is not required to prove each of the overt acts. It is sufficient if it proves the commission of at least one of the overt acts at or about the time alleged.

In addition, the government must show that at least one overt act was committed in the Southern District of New York, which includes Manhattan.

It is not required that the government prove that the scheme to defraud started and ended on the exact dates alleged in the indictment. It is sufficient if you find that in fact a scheme to defraud existed at some time within the period set forth in the indictment.

In fact, the government may have proved that on the one hand the schemes began either before or after 1968, or that on the other hand, they ended before or after July 5, 1977, which was the date of the filing of this indictment.

This variance in dates is not of any importance so long as the scheme charged was in existence at some time between those two dates and continued after July 5, 1972.

Once again, as I have previously said, it is not necessary that the government prove every aspect of the schemes to defraud as they are described in the indictment or the existence of more than one scheme as to any one count, so long as it proves any of the schemes charged in any count to comport with the legal requirements I have already instructed you about. It would still be your duty to convict even if you found that the government had proven only one of the pretenses, representations, or concealments of a material fact charged in the indictment, and that each of the other essential elements that I have previously described to you has been proven.

As in much of what you, the jury, are required to do, this is nothing more than using common sense in applying the legal principles I am giving you to the facts as you find them.

I said earlier that you ladies and gentlemen are the triers of the fact and that you must determine the truth. A word as to how you determine the truth:

How do you appraise the credibility of the witnesses? How do you consider the evidence before you?

As has been said to you before, perhaps in other contexts, I will say it here now, you use your plain, every day common sense. Each of you brought your common sense with you when you first stepped into the jury box. You have it with you now, and I am confident that you will take it with you when you retire to the jury room to deliberate upon this case.

I trust that when you return ultimately from the jury room that you will still have it with you.

You have seen and heard the witnesses. You have observed the manner of their testifying and whatever credit you may give them must be determined by their conduct and their manner of testifying and their relationship or interest in the outcome of the case. You may of course take into consideration the interest of the witness. An interested witness is not necessarily unworthy of belief. That is just one factor, however, which you should consider in determining the weight and credibility to be given to that witness' testimony.

If any witness has wilfully testified falsely to any material fact, you may disregard all of that witness' testimony or accept such part of it as you believe worthy of belief or as it appeals to your reasonable judgment.

A witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with his present testimony.

If you believe that any witness has been impeached and thus discredited, or any evidence of any other kind discredited, it is your exclusive province to give the testimony and the evidence just such weight and value as you may think it deserves.

One government witness, George Barney, admittedly participated in some of the crimes charged in the indictment. Thus, he is considered an accomplice. The government frequently must use such testimony because otherwise it would be difficult or impossible to detect or prosecute wrongdoers.

The testimony of an accomplice is not to be rejected until you think that it has no weight. Like any other fact, it is to be taken up and dealt with by you, by you who are the triers of the facts.

(Continued on the next page.)

If accomplices could not be used, there would be cases where there is real guilt and where convictions should be had and where convictions would not be obtainable. The testimony of accomplices may properly be considered by you but it must be received with caution and weighed with great care. If you believe the testimony, a defendant may be convicted on the uncorroborated -- that is, the unsupported -- testimony of an accomplice.

On another subject, Mr. Hasenstab has chosen not to take the witness stand and testify on his own behalf. There are many reasons why a defendant may decide not to testify. You should not speculate as to why the defendant did not testify. You may not draw any inferences whatsoever from anyone not taking the stand and testifying. The law does not impose upon the defendant a duty to call as witnesses any persons who are shown to have been present at any of the events involved in the evidence or who may appear to have some knowledge of the matters in question.

As I have charged, the burden of proof was on the government at the outset and remained upon the government during the entire trial.

You have seen, as I recall it, two charts in this case and as I recall it, there may or may not be summaries as well. Those have been presented assertedly on the basis of the evidence that was already before you and they were presented as a means of clarifying or presenting more graphically or intelligibly things that you heard from other evidence in the record or saw from other evidence in the record.

Charts and summaries are allowed into evidence as pictorial or visual representations or resumes of information or data that you already had from other evidence in the case. So, in considering the charts or any summaries or materials of that nature, you must make a judgment as to how correctly and fully and fairly they set forth the evidence or information found elsewhere in the record. You must find, in order to use it effectively and fairly, that a chart is a fair summary of the things it purports to show but if you find that, that the chart or summary is fair and is based on other evidence which is in the record before you, then you may use it for whatever assistance it supplies you in your understanding of the facts in dispute and in your effort to reach conclusions about those facts.

The evidence shows that on December 1, 1976, and on January 6, 1977, when George Barney met the defendant, Mr. Barney was equipped with or used a recording device.

Just in case you may have been having some doubts on the subject, I am instructing you, as I did at the outset of the trial, that the use of such a device in the manner described in this case is entirely within the law and violated no one's rights. This is so essentially because Mr. Barney, who was a participant in both conversations, consented to have them recorded. Accordingly, the use of the recording device was a proper investigative technique.

There is testimony in this case and indeed there are government exhibits in evidence in connection with conversations which the government alleges Mr. Barney had with Mr. Hasenstab. I am referring of course to the tape recordings which are in evidence as government exhibits.

Ladies and gentlemen, you recall that you heard the tapes and you had certain transcripts before you. I instruct you that you are not bound by those transcripts which you had before you which were merely to assist you. If you wish to consider the tapes, you should consider what you heard and if you decide to listen to the tape recordings at any time during your deliberation, I instruct you now that it is what you hear on the tape recordings that will control and not what is on the transcripts.

I will conclude with these few final remarks. Under your oath as jurors, you may not allow the consideration of punishment which may be inflicted upon a convicted defendant to influence your verdict in any way or in any sense enter into your deliberations. Both sides, the government as well as the defendant, are to be treated the same. They are to be treated fairly. You should not be biased or prejudiced with regard to either.

Your function is solely to determine the guilt or innocence of the defendant upon the basis of the evidence before you. If you believe that the evidence shows beyond a reasonable doubt that the defendant was guilty of any of the charges made in the indictment, you may find him guilty of the charges which you believe have been proved beyond a reasonable doubt.

On the other hand, if you believe that the charges or some of them have not been proved beyond a reasonable doubt, the defendant should be acquitted on the charge or charges which you believe have not been proved beyond a reasonable doubt. On the other hand, if you find the law has been violated, you should not refuse, because of sympathy or any other reason, to render a verdict of guilty.

There are 12 men or women who will go in to deliberate on this case as the jury. Any verdict must be the unanimous verdict of all of you. I point out, however, that no one should enter upon the deliberations in the jury room with such pride of opinion that he or she would refuse to change it if convinced by intelligent argument on the part of another juror or jurors that they are right. Howaver, you are not to do violence to your own well founded opinion and common sense.

As I said a few moments ago, you will be taking your good common sense with you into the jury room. I expect that when you come out of the jury room your good common sense and your good conscience will accompany you. You are entitled, each of you, to your opinion. In other words, each of you must decide the case for himself or herself after thoroughly exchanging views and reviewing the evidence with your fellow jurors. After you have exchanged your views and reviewed the evidence, you should vote. As I said, a unanimous verdict is required. You should vote on the first count, guilty or not guilty. Then, you will vote on the second count, guilty or not guilty. And finally, you will vote on the third count, guilty or not guilty.

As I said, each count should be considered separately and a unanimous verdict is required.

It is the custom in this court that the juror seated in number 1 will serve as the foreman or forelady as the case may be. In this case, Mrs. Itak is seated in seat number 1. Mrs. Itak will serve as the forelady. It will be her function to take a tally of the jurors as they vote, and keep count.

In addition, I indicated that you may make inquiry of the court for testimony, for exhibits, for portions of the charge. The inquiry will be in the form of a note which you will send out through the marshal who will be attending you. The forelady will see to it that any notes or any inquiries which any juror wishes to make are put down on paper and either the forelady may write it or the juror who has the question may write it. The paper is then given to the marshal and he will bring it to the courtroom. I will be here with the attorneys and will review the note with counsel and, wherever possible, will attempt to answer the request or inquiry within a reasonable period of time.

I do suggest that if any of you have questions, you try to make the questions clear and as precise as possible because we will not be in the jury room with you and if your questions are not precise, we will not know what you are thinking and will have some difficulty in responding.

So, if you can put your questions down as clearly as possible, we will do our best to respond in the shortest possible time.

I have completed my charge. At this time I will ask our alternate juror, Mrs. Azzara, if she has any belongings in the jury room, to proceed to the jury room, to reclaim her belongings and then return to her seat. If she has nothing in the jury room, she may remain in her seat.

I will discharge her after I have sent the jury to deliberate.

At this time, I will see counsel at the side bar.

(At the side bar)

THE COURT: Are there any exceptions to the charge, Mr. Kingham?

MR. KINGHAM: No, your Honor.

THE COURT: Mr. Friedman?

MR. FRIEDMAN: Yes. If your Honor please, in the earlier portion of your charge, describing the elements of mail fraud and telephone calls, the word used by your Honor as to the third element was that it must be shown that "The scheme involved use of the mails or telephones" and I don't believe that that is the precise statement of the law which is required and may have misled or may mislead the jury."

THE COURT: That was my initial summary, counsel. If you recall, I thereafter very elaborately charged the jury with reference to each of the three elements-- I would suggest very elaborately with respect to the third element, so the point is that the charge must be considered as a whole and if there is anything in my description of the third element, which goes on, I must suggest, for approximately four typed pages, where you feel that the matter wasn't covered, certainly I would hear you; but I don't think you can seize upon the one summary statement and then say that the matter wasn't covered when a few minutes later the element was discussed with the jury at considerable length.

If there is something that was left out from the overall charge, please indicate the matter to me at this time.

MR. FRIEDMAN: I feel that the use of the word "involved" may have taken away from what I consider to be the essential language that the mailing must be for the purpose of carrying out the scheme; that it tends to weaken the strength of that language and that's why

I took exception to the use of that word.

THE COURT: I understand your point.

MR. FRIEDMAN: I understand your Honor's point.

THE COURT: Later on I say, among other things, "Count 1 rests on the mail fraud statute. To satisfy the requirements of that statute and the third essential element" -- and I think I said of Count 1 or in Count 1 -- "The proof must show that there was at least one use of the mails which was for the purpose of furthering or executing the alleged fraud." I used words to that effect and I think that covers the matter.

In any event, you have your exception.

MR. FRIEDMAN: Thank you.

Your Honor also indicated in reference to circumstantial evidence, if my notes are correct, something to the effect of "guilt is something to be inferred from circumstantial evidence." I didn't quite -- I wasn't able to quite get all of the language but on that aspect of your charge, my notes indicate and my recollection is that you indicated that guilt be inferred from circumstantial evidence,and I don't think that that is quite what your Honor would mean to say is the law.

THE COURT: I did indicate, "The existence or nonexistence of guilty knowledge is something commonly to be inferred from what is called circumstantial evidence as distinguished from direct evidence."

I did say that and I think that's proper.

That may be what you had in mind. I don't see that I said anything about the existence of guilt. I did say, as I say, the existence or nonexistence.

MR. FRIEDMAN: Maybe I misheard it; I am not certain and I don't vouch for the accuracy of my hearing, but my recollection is that your Honor used the word "guilt" without the use of the word "knowledge". I could be in error but nevertheless I must take my exception. If I misheard it, the record would reveal, of course, what your Honor said.

THE COURT: Mr. Kingham, do you have any recollection of that?

MR. KINGHAM: I believe, your Honor, that you said "guilty knowledge," because that comes during a discussion of Counts 1 and 2, and I noted that circumstantial evidence is included in that, and my recollection is to the contrary; and I am sure the record will reflect it and bear you out.

THE COURT: Well, let me suggest, if I read what was in front of me, I read it as "guilty knowledge" and if I didn't, the record, as has been indicated, will reflect it.

Anything else?

MR. FRIEDMAN: Yes, if your Honor please.

In reference to the issue of mailing, in a portion of your Honor's charge you talked briefly about purchase orders or invoices being mailed back and forth in the conduct of this Pan American's business. I believe that you then charged the jury, "I instruct you that you must find one such mailing before you can convict," and, if your Honor said that, I would take exception to it because the issue for the jury to determine is whether or not it finds the mailing to be for the purpose of carrying out the scheme or artifice.

THE COURT: Your shorthand may have been a little off and I did state "I instruct you that you must find at least one such mailing under the instructions I have just given you before you may convict on Count 1," and again I suggest to you that you must take the entire charge in context and not extract out one sentence.

In any event, if you except to my charge in that area, you have your exception.

Is there anything further?

MR. FRIEDMAN: Thank you. Just a moment more and I think I will be finished.

When you charged the law on aiding and abetting and you talked of knowledge and guiltiness, I don't believe you referred to the fact that the aiding and abetting with its concurrent elements of wilfulness and knowledge must have been in reference to a violation of the mail fraud statute and it was, I felt, a general statement which the jury might take to apply to some other type of fraud which is speculative, which is not within the statute or some of the conduct which is not within the statute.

MR. KINGHAM: I think your Honor did point out that the charge on aiding and abetting related to Section 2, and that Section 2 related to the first two counts of the indictment.

THE COURT: Yes, I did. I thought I made it quite clear on at least one, or more than one, occasion.

MR. FRIEDMAN: Maybe my interest on the part of the defendant affects my judgment. However, I did not quite get it that way, and of course that's why I take the exceptions to your Honor's charge.

THE COURT: Very well. You have your exception on that.

MR. FRIEDMAN: Next, if your Honor please, there came a time when you said to the jury, "There is the adage, "Action speaks louder than words."

THE COURT: "Actions speak louder than words," yes.

MR. FRIEDMAN: And you said, "That is applicable here," and I think that is a direct expression which may be taken as an opinion, by the jury, the opinion of the court, and I take exception to that language.

MR. KINGHAM: I believe it is on the existence of the conspiracy, your Honor.

THE COURT: What I said is "In determining whether there has been an unlawful agreement, you may judge acts and conduct of the alleged members of the conspiracy which are done to carry out an apparent criminal purpose. The old adage, 'Actions speak louder than words,' is applicable here," and I think that that is a perfectly appropriate comment and you have your exception.

MR. FRIEDMAN: Thank you, sir.

My last exception is a reference to the recitation of the overt acts set forth in the indictment. When your Honor was reading the overt acts, I believe that you indicated to the jury that if they found one such overt act had occurred, and I now quote, you said, "Your duty will be to convict."

I take strong exception to that language. I think that deprives the jury of its ability to exercise its function on this issue.

THE COURT: You say that occurred after I read the overt acts?

MR. FRIEDMAN: It was in the area where your Honor was reading the overt acts. I believe it came after your definition of what an overt act is. You mentioned the date 5/24/76, I believe.

MR. KINGHAM: That date would be in quoting from the indictment, your Honor. That date relates to one of the checks that is in evidence that is charged as an overt act.

I don't recall the phrase to which counsel is referring.

THE COURT: A duty to convict -- I am trying to find it in my notes here. I must say I don't see it. If you can be more specific as to where you believe I said it --

MR. FRIEDMAN: I can only give it to you in the context that I have, your Honor.

THE COURT: Where did it follow?

MR. FRIEDMAN: I believe that it followed after you read the four overt acts.

THE COURT: After I read the overt acts, I stated in words or substance as follows:

"Obviously, for persons to have conversations or prepare and mail documents, checks or letters is not in and of itself criminal conduct" -- let me do this, even better.

Let me ask the court reporter to go to the portion of the charge where I read the overt acts and read what followed it.

(Pause)

THE COURT: I found something. Just a moment.

In reviewing the matter, I did, in the discussion not of overt acts but of variance in dates, I did indicate something as follows:

"Once again as I have previously stated, it is not necessary that the government prove every aspect of the schemes to defraud as they are described in the indictment,or the existence of more than one scheme as to any one count,so long as it proves enough of the scheme charged in any count to comport with the legal requirements I have already instructed you about."

It would still be your duty to convict even if you found that the government had proven only one of the pretenses, representations or concealments of a material fact charged in the indictment," and then I go on and I would suggest that when taken in its context, that portion of the charge is proper.

MR. FRIEDMAN: That concludes my exceptions.

THE COURT: Do you want to make any comments about that?

MR. KINGHAM: No. I agree with your Honor.

THE COURT: And finally you said --

MR. FRIEDMAN: That concludes my exceptions.

THE COURT: Exceptions are duly noted.

Any requests for supplementary instruction, Mr. Kingham?

MR. KINGHAM: No.

THE COURT: Mr. Friedman.

MR. FRIEDMAN: One, if your Honor please. I believe the rule of circumstantial evidence when applied may only be used when it points -- that is the circumstantial evidence of guilt, must point exclusively to guiilt and may not be consistent with innocence and if the circumstantial evidence is consistent with either innocence or guilt, the jury must adopt the innocent construction of the circumstantial evidence.

MR. KINGHAM: I believe that's the double inference rule, which has been rejected in this circuit.

THE COURT: Yes, I remember it, having put it into a charge some months ago and after the conviction, the government was quite exercised about my having put it in in the first place.

I considered the matter at that time and determined that I had probably, in an excess of zeal to protect the defendant's rights, gone too far but of course after the conviction, that became somewhat of an academic matter.

In any event, I decline to supplement the charge as requested.

Is there anything further?

MR. FRIEDMAN: That's all I have.

MR. KINGHAM: No, your Honor.

(In the presence of the jury)

THE COURT: Mr. Guranich, would you swear the marshal, please?

(One marshal duly sworn)

THE COURT: Very well.

Ladies and gentlemen, you are going directly to lunch -- that is, with the exception of Mr. Azzara, who is going to be discharged at this time with my thanks. I will see her after you have gone.

I have arranged with the marshal that you are going to lunch at the Antica Roma. If you enjoy good Italian cooking, I think you will find it there.

Is that the place, Marshal?

THE MARSHAL: Yes, your Honor.

THE COURT: It's been arranged. We are a little late for the appointment but I am sure they will be indulgent

I ask the other participants in the trial not to eat at that restaurant.

Leaving this hour, when do you anticipate that the jury will return, so that the court and counsel will be available, Mr. Marshal?

THE MARSHAL: Hopefully at 2:15.

THE COURT: Very well. I am going to place the jurors in the custody of the Marshal. I am going to instruct you now as you go to lunch, as you sit probably at separate tables and as you return from lunch, that you not discuss the case. Do not discuss the case until you have reassembled in your jury room after lunch.

When all of you have gathered around the table, at that point, discuss the case as fully and as completely as you believe appropriate.

The jury is placed in the charge of the Marshal.

Mrs. Azzara, if you remain, I would appreciate it.

(The jury left the courtroom at 12:55 P.M.)

(Note received from the jury at 3:45 P.M.)

(Marked Court's Exhibit 7.)

(In the courtroom, 3:50 P.M,, jury not present.)

THE COURT: Good afternoon. I have received a note from the jury which I have had marked Court's Exhibit 7. The note, which is the first received from the jury, reads as follows:

"Jury has finished its deliberation. Forelady, Josephine Itak."

Mr. Guranich, would you please take the exhibit and would you bring the jury in.

(The jury entered the courtroom at 3:55 P.M.)

THE COURT: Good afternoon, ladies and gentlemen. I have received the note from your forelady indicating that the jury has finished its deliberation.

May I just inquire from the forelady, does that mean that the jury has reached a verdict?

THE FORELADY: We have, your Honor.

THE COURT: Very well.

Mr. Guranich, would you call the role of jurors and then please take the verdict.

THE CLERK: Ladies and gentlemen of the jury answer present as your name is called.

(Jury roll call)

BY THE CLERK:

Q Madam foreman has the jury agreed upon a verdict?

A Yes, we have.

Q What is that verdict on Count 1?

A Guilty.

Q On Count 2?

A Guilty.

Q On Count 3?

A Guilty.

THE COURT: Ladies and gentlemen of the jury listen to your verdict as it stands recorded. You say you find the defendant William E. Hasenstab guilty on Count 1, guilty on Count 2 and guilty on Count 3 and so say you all.

(The jury answered with "Yes.")

THE COURT: Mr. Friedman, do you wish to have the jury polled?

MR. FRIEDMAN: No, your Honor.

THE COURT: Good.

Ladies and gentlemen, I never tell a jury whether I agree or disagree with their verdict because your verdict is a very important thing to you and to the administration of justice. Whatever it is, I know that it represents the well considered judgment of each of you and a speaking by you of your own consciencesas you see it.

But I do indicate to jurors if I find that they have been conscientious in my view in the performance of their duties. I found this jury to be most conscientious. I observed from the time you were impaneled until you filed out at noontime how you listened to the evidence, how you watched and as the recordings for example, were being played, I noted the pages turning practically in unison, indicating that you were paying strict and close attention.

I watched you this morning during the summations, and during my own instructions,and I know that you as individuals and as a group took this very important duty of citizenship most seriously.

For that, I thank you.

I think you will agree with me that it is not an easy matter to sit in judgment on another person. Yet, it is one of the guarantees that each of us has in this country to be judged by a jury of our fellow citizens who have sworn to listen to the evidence without being prejudiced or biased and,without fear or favor to do their duty as they see it;and I think this is one of the things that makes our country what it is today,and I hope that as time goes on, justice, as we know it, in individual cases, can be extended to all facets of our national life.

I want to take this opportunity on my own behalf and on behalf of the court in which I serve to thank each and every one of you for your jury service.

Thank you all.

Mr. Guranich.

(Jury discharged)

THE COURT: Mr. Friedman, would you make any motions you wish to at this time.

MR. FRIEDMAN: I would prefer to reserve the motions if I may, Judge.

THE COURT: Very well.

I believe a pre-sentence report would be appropriate in this case. I would assume that the defendant faces serious penalties, has no prior criminal record and that a pre-sentence report would be beneficial in my consideration of the sentence to be imposed.

When a defendant pleads guilty before me, Mr. Hasenstab, I tell him, suggest to him that he be frank and candid with the Probation Department as I believe that to be in the interests of those people who accept their culpability.

You have chosen to stand trial. You have been convicted by the jury and I suggest that it is up to you-- some defendants choose not to discuss matters at all with the Probation Department. I would not direct you to do one thing or another. I know Mr. Friedman will confer with you and give you his views on the matter, but I still think that a pre-sentence report would be appropriate in this case; and therefore I direct that one be prepared, unless of course, Mr. Friedman, you wish to waive that and proceed to sentence now. I can do that but I think Mr. Hasenstab's best interests would be served by the preparation of a pre-sentence report.

MR. FRIEDMAN: As a matter of fact, Judge, I would think if it were done by my waiving such a report I would be doing an injustice to Mr. Hasenstab.

THE COURT: I agree.

Very well, then I direct a pre-sentence report be prepared. Before I determine the date for sentencing, I think I should inquire of Mr. Kingham whether it his intention that the government seek a remand here or not. The reason I say that is that, needless to say, if the defendant is incarcerated, then I would set down the sentencing for an earlier date. If he is to remain at liberty, I would probably extend the matter a little bit to give our Probation Department a little more time, but I do not make that comment, Mr. Kingham, with the idea of influencing your view.

MR. KINGHAM: Well, your Honor, in view of the fact that Mr. Hasenstab has appeared on every occasion that I know of that he is supposed to have been here, and also in view of some of the events that have gone on in this trial, both at the side bar and in the testimony, we have no objection to his continuing his present bail status.

THE COURT: As I understand it, he is ROR with the bail limits to include the continental United States.

I would not consider that Mr. Hasenstab is a person who would jeopardize much more than he has already jeopardized by flight.

MR. KINGHAM: We also hold his passport, your Honor. You should know that.

THE COURT: But I do want you to be aware of the fact that it is ROR, and you have no objection to that.

MR. KINGHAM: No, your Honor.

THE COURT: As I say, I think I know my defendants at least within limits and I would be quite surprised if Mr. Hasenstab, who came here first during the blackout -- I remember the day--not being here when he is supposed to be.

Mr. Guranich, look ahead to five weeks and see what we have in the way of sentencing date.

That would put us to the end of September.

I would suggest that we set this matter down for sentencing on Wednesday, October 5th, at 9:30 A.M. in courtroom 35 if that is agreeable to both the attorneys.

MR. KINGHAM: It is to the government, your Honor.

MR. FRIEDMAN: It is to the defendant, Judge.

THE COURT: Very well.

Do you wish to make the formal application to continue Mr. Hasenstab on his own recognizance?

MR. FRIEDMAN: Yes, your Honor. So move.

MR. KINGHAM: No objection.

THE COURT: Very well. On application of the defendant, the government indicating no objection, the defendant is continued released on his own recognizance.

Mr. Hasenstab, I direct that you return to appear before me for sentencing on Wednesday, October 5, 1977, at 9:30 A.M. in courtroom 35.

I am continuing you on your own recognizance. Your bail limits are to include the continental United

States. You are directed not to travel beyond the continental limits of the United States.

I must advise you that if you fail or refuse to appear for the sentencing on the date, time and place which I have set, you would subject yourself to further penalties, which I am sure you neither want nor need.

If there is no further business, I am prepared to adjourn the court.

MR. KINGHAM: Nothing for the government.

MR. FRIEDMAN: Nothing for the defendant.

THE COURT: Court is adjourned.

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I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability from my (our) stenographic notes of this proceeding.

Official Court Reporter
U. S. District Court

nsmch

UNITED STATES OF AMERICA

v. 77 Crim. 509

WILLIAM E. HASENSTAB

Before: HON. ROBERT WARD, District Judge.

New York, New York - October 5, 1977, 10:00 a.m.

For the Government: T. BARRY KINGHAM, Esq.

For the Defendant: RICHARD D. FRIEDMAN, Esq.

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THE COURT: I apologize for the delay in our beginning this morning. I had a matter involving a three-judge court which has occupied my time.

We will proceed now with the matter which was set down for 9:30.

THE CLERK: United States of America v. Hasenstab.

MR. KINGHAM: The Government is ready, your Honor.

MR. FRIEDMAN: The defendant is ready, your Honor.

THE COURT: The Court notes that the defendant, William E. Hasenstab, and his attorney, Richard D. Friedman are present.

Mr. Friedman, is there any reason why sentence should not be imposed at this time?

MR. FRIEDMAN: Yes, your Honor.

Your Honor will recall at the conclusion of the trial the defense was permitted to reserve until the date of sentencing any motions with respect to the verdict.

At this time, in support of an application which I shall make, I should like to respectfully hand up to your Honor the slip opinion of the U. S. Court of Appeals for the Third Circuit in United States of America v. Tarnopol and Hughes under Criminal No. 75-312, the decision upon which was rendered unanimously on August 9, 1977.

I would respectfully request that your Honor direct his attention to page 10 of that opinion, a copy of which opinion I am giving to Mr. Kingham at this time.

I received this opinion yesterday, although I have been trying to get it for some days.

I don't know whether I should proceed to comment upon it while your Honor reads the noted portion or if your Honor wants me to reserve my comment at the moment.

It has to do with the use of the mails and whether or not documents which are used in the ordinary course of transactions of businesses, if not related to the purpose of executing a fraud, can be the basis of a mail fraud or wire telephone fraud prosecution.

THE COURT: I find here that the documents were directly related to the purpose of the mail fraud. They were, among other things, and I thought I made this clear to you when you raised another matter at the time of trial, another case, they were invoices by virtue of which Pan American paid out money and, as I recall it, there were also checks in payment of those invoices. These are not unrelated mailings.

I say, in connection with what in essence is the dishonest conduct of an employee, if the conduct results in vouchers and orders being sent through the mail and funds being disbursed by the employer through the mail, which is what happened here, you have mailings which in my judgment were closely related to the scheme which was the subject of the indictment in this case.

Accordingly, I reject the proffered case as being distinguishable on its facts from the facts which were presented to this Court and to the jury.

You may proceed, counsel.

MR. FRIEDMAN: Shall I pass on that issue without speaking further to it?

THE COURT: Yes. I have already been presented with that.

I suggest to you there is a legal doctrine which flows from the Maze case, but I say to you that each case must be distinguished on its own facts. Here I find that the mailings in question were closely related to the scheme and thus sufficient to bring the conduct of the defendant within the provisions of both the mail and the wire fraud sections.

MR. FRIEDMAN: If your Honor pleases, I address the Court, and your Honor realizes that I am addressing myself in the form of setting aside the verdict as being insufficient on the facts and the law under Rule 50.

THE COURT: I deem the motion to have been made timely and in a proper form. I am prepared when you finish to rule on it.

MR. FRIEDMAN: I suggest in making my motion to set aside the verdict, in reference to the wire fraud count in this case, that this record was devoid of any testimony completely relating to the use of the telephones for the purpose of perpetrating a fraud in any fashion. Not only was the record devoid of any testimony relating to the use of telephones to perpetrate a fraud, the record was devoid of any testimony relating to any specific use of the telephone in any fashion.

I believe the nature of that evidence was the subject of some comment by your Honor at the time just prior to the submission of this matter to the jury. I feel that on the facts and the law that evidence was totally lacking. Therefore, those counts should be dismissed by this Court and the verdict should be set aside in reference to those counts.

THE COURT: You speak of count --

MR. FRIEDMAN: I think count 2 and a conspiracy count to violate the wire fraud statute.

If I were to be successful in my application with respect to count 2, then I believe the conspiracy count in relation thereto should likewise fall.

THE COURT: Very well.

Is there anything else you wish to say on that matter?

MR. FRIEDMAN: No, your Honor.

THE COURT: Mr. Kingham, there are two points which counsel made. If you want to address yourself to the first of them, which I have already dealt with on a preliminary basis, you may do so, and then you can turn to the question of the wire fraud counts.

MR. KINGHAM: As to the mail fraud, the position we took at trial and the basis on which the Court ruled on our position was correct. I have no further comment on that.

Although I am not familiar with the Tarnopol case, I have had a chance to peruse it and I think it is distinguishable on the facts.

I call to your Honor's attention the quote on page 11 in which the Third Circuit states, "In each case, the question is whether or not the 'mailings were sufficiently closely related to respondent's scheme' to bring it to indictment." I am quoting from the Maze case.

I suggest this Court's rulings that the mailings were sufficiently related and based on the evidence in this case is correct. Each case is to be decided on its own facts.

As to wire fraud, as we argued at trial and summed up to the jury on the theory, I submit they must have accepted,or they would have acquitted on the wire fraud count; Mr. Barney's testimony is clear that he used interstate telephone facilities to defraud Pan American. It was necessary for him to use those phone facilities to get Mr. Hasenstab to continue to produce orders or to approve orders which were placed from Mr. Welger's facilities at Rockleigh, New Jersey.

I submit the evidence of wire fraud in this case was sufficient to send the case to the jury and is sufficient to sustain their verdict, considering that it must at this time be viewed in the light most favorable to the Government.

THE COURT: I am prepared to rule on the motion to set aside the verdict.

I have indicated preliminarily that the Tarnopol case which was handed up really is an extension of Maze and that in the case before the Court, this case, the mailings were sufficiently closely related to the defendant's scheme to bring his conduct within the ambit of the mail fraud statute.

Accordingly, the motion to set aside the verdict as to count 1 is denied.

With respect to wire fraud, the Government's case was not as strong, I would suggest, but was sufficient to persuade me that there had been telephone communications back and forth between New York and New Jersey sufficient to put the case to the jury. I did so. The jury having deliberated on the case and having returned a verdict of guilty, I must now view the evidence in the light most favorable to the Government. Doing so, I find there is enough in the evidence presented through the testimony of Mr. Barney and other evidence as well, but primarily resting on the testimony of George Barney, to lead me to conclude that the Government made out, albeit a weaker, a prima facie case, and made out a sufficient case on count 2 to withstand the motion to set aside the verdict as to that count.

Accordingly, the motion to set aside the verdict as to count 2 is denied.

With reference to the conspiracy count, since I have denied the motions with regard to counts 1 and 2, I would add that there is sufficient in the record, viewing the evidence again in the light most favorable to the Government, to sustain the conviction on the conspiracy count.

Accordingly, to the extent the motion was directed to setting aside the verdict on count 3, the motion is likewise denied.

I would ask counsel for the defendant at this time, since the motions were made and I deem them to have been made in a timely and proper fashion and they have now been ruled upon, whether there is any reason why sentence should not be imposed at this time.

MR. FRIEDMAN: No reason, your Honor.

THE COURT: Mr. Hasenstab, is there any reason that you know of why sentence should not be imposed at this time?

THE DEFENDANT: No, your Honor.

THE COURT: Mr. Hasenstab, you may be seated.

I will ask defense counsel whether there is anything he wishes to say in his client's behalf or any evidence he wishes to bring to the Court in mitigation of punishment.

I shall make similar inquiry of Mr. Hasenstab and finally I shall make inquiry of Mr. Kingham if there is anything the U. S. Attorney wants to say or add.

I would note for the record before counsel begins that I have before me what I believe to be a full and comprehensive presentence report, which I presume has been reviewed by defense counsel.

Let me be certain of that. Have you had an opportunity to review the presentence report, Mr. Friedman?

MR. FRIEDMAN: Yes, I have.

THE COURT: I have before me, and I have read carefully, a letter from the defendant's wife, a letter from a gentleman I believe to be the defendant's brother, a letter from the defendant's brother-in-law, and four letters from persons who I would describe as friends of the defendant, all of which were supportive of the defendant.

In addition I have received and have before me a letter dated October 3, 1977 addressed to the Court from Mr. Kingham which indicates a carbon copy to Mr. Friedman.

Finally, I have a letter from Mr. Friedman to John Wing dated September 15, a copy to me and a copy to Mr. Hasenstab, concerning the possibility of a conference where the defendant might make certain information available to the Government.

I have all these materials in front of me. I have read them all.

With that background, I would ask Mr. Friedman if he wishes to present to the Court anything in the form of information in mitigation of punishment, beyond what I have indicated as already before me.

MR. FRIEDMAN: Thank you for the opportunity of conveying my thoughts to your Honor in reference to the subject of sentence. It's a very difficult one and different people have different attitudes as to types of sentence to be imposed on different types of cases.

I know from the probation report, which I have reviewed, from my contact with the defendant for some twelve months,having had contact with him well prior to the indictment in this case, the nature of his family involvement, his family, his wife and his children, the details of which are set forth in the probation report.

I frankly feel, while we are bound by the verdict of the jury, and the defendant recognizes his wrongful conduct, whether violative of the federal statute or otherwise, I view this case, and I think that his family views this case, as one where your Honor might very well take into consideration among all of the factors any destructive influence which might be created if this defendant is incarcerated.

I call your Honor's attention to the fact that, not only did the defendant have to resign his position of many years' standing at Pan American, but since he has done that he has been unable to secure gainful employment. The awareness of his neighbors of the FBI and the federal investigation from the intensive activity of agents in the community, making inquiry in the community, have reduced him in stature in the community if not more than a conviction.

All people have pride and ego and standing in the community if they live the type of life that one would normally live as a decent citizen. I am sure in the relationship that Mr. Hasenstab has within the community he has lost that esteem and will never be able, no matter what happens on this case, in appeal or otherwise, to gain the esteem in the community.

I am sure that Mr. Hasenstab will find extreme difficulty in finding gainful employment at the financial level where he was previously employed by Pan American, and he and his family will suffer by reason of his conduct.

When your Honor imposes sentencing in this case, I ask your Honor to take into consideration principally the defendant's relationship to his family at this time and the fact that he has always tried to do the best that he could for his family, and he remains close to his wife and his young children today, and bearing in mind the goals of sentence and the danger to the community in a given case and all the other factors which I am sure will be considered by this Court. I ask the Court to consider the possibility of a noncustodial sentence in this case or, perhaps, if a sentence of a custodial sentence is required, to consider weekends.

I have had occasion, as the letter to Mr. Wing indicates and then the letter from Mr. Kingham to your Honor indicates, to have conferences with the Government concerning Mr. Hasenstab. I have a copy of the letter sent from Mr. Kingham to the Court. I would like to comment on it.

I think it's really outrageous to put to the Court the logic in this letter. I point out quickly why.

If your Honor will refer, please, to page 1 of this letter, the letter itself indicates that Mr. Hasenstab was asked to come into the office and to provide names of people in an effort to cooperate so the Government could perhaps investigage questionable purchasing practices. In the very next sentence Mr. Kingham, the author of the letter, indicates, "It is clear from Mr. Hasenstab's conversation with me he did so in an effort to minimize his own culpability and he was not alone to accept monies from supplies."

The very thing he was asked to do was point out names of other people involved. When he points out names, the very thing that the Government wants the Government objects to his attitude and says it was done because he wants to minimize his own culpability.

Obviously, he did it out of an effort to minimize any sentence that this Court might impose in an effort to show, notwithstanding the innate reluctance he might have to give certain names to the Government, that he gave those names in an effort to show some degree of cooperation to the Government.

I don't think it is fair or logical to criticize his attitude in respect to the giving of those names.

I point out to your Honor further that the Government's contention on page 2 of its letter that "he refused to respond to questions regarding his income tax returns, even though he was advised at the outset of our interview that his answers would not be used against him. In sum, Mr. Hasenstab's cooperation is useless to the Government be-ause he refuses to admit that proven facts by the Government are true."

If the Government has facts which are proven, I cannot see the logic to say to Mr. Hasenstab, "You admit those facts are true and let's go over them again or else this interview is no good." The purpose was not to go over proven facts, but to give the Government leads which it wanted and which it thought Mr. Hasenstab might have.

The only criticism that I think is valid, if it is valid, is the natural reluctance of Mr. Hasenstab, although he provided information to the Government, to put himself in a position where he might jeopardize himself to tax charges previously threatened by the Government, and also put himself in a position where he would be asked to testify against certain people.

When we came into the Government's office to the conference, I brought an envelope with me with documentation existing of records Xeroxed by the Pan American, indicating transaction by transaction, illustrious transactions at a higher echelon where he said this is a practice that goes on, and he said if you investigate you will find that they were not proper purchasing practices.

We offered to the Government by proper identification the specific information in I believe at least six specific transactions involving the level of certain vice presidents of the company. That is the level at which Mr. Hasenstab offered his cooperation. We indicated that Mr. Hasenstab, if given other documentation from the company, could, because of his familiarity with analysis of the company's records, point out like situations if the Government wanted to take the time and trouble to do it.

The truth of the matter is the Government will settle for no less than Mr. Hasenstab putting himself in Mr. Barney's position and put himself on the stand. Not every man can bend to the will of the Government and testify against somebody else. If that is a false honor, false value, then Mr. Hasenstab has to live with that and be punished for it.

He did make an effort to cooperate and he did give the names in question.

That is all I have to say.

THE COURT: Thank you, Mr. Friedman.

A few moments ago I said I would call on you. I would ask you at this time whether there is anything you wish to say on your own behalf or any information you wish to present to the Court in mitigation of punishment.

THE DEFENDANT: The only thing I would like to say, your Honor, is that I hope you show some mercy in your sentence.

THE COURT: Thank you. You may be seated.

Mr. Kingham, I would call upon you to inquire whether you have any comments or recommendations prior to the Court's imposing sentence.

MR. KINGHAM: Your Honor, if I may, first of all, I would like to respond to Mr. Friedman's comments with respect to our letter. I think that the letter, which was the result of a conference in my office last Friday between Mr. Friedman, Mr. Hasenstab, Special Agent Lynch of the FBI, and myself, speaks for itself.

With respect to the proffered cooperation, Mr. Hasenstab did supply the Government with illustrious examples of situations in which others at Pan American might have committed improper acts. We have acknowledged that to the Court.

There are two problems. First of all, the information which Mr. Hasenstab gave us is indeed illustrative, is based on his reading of the documents and hearsay he heard around Pan American. It involves basically people in situations which the Government has the ability to check out, and indeed will do so.

However, when it comes to believing Mr. Hasenstab, the Government has a tremendous problem. We have no Litmus test, as the Court knows, for gauging the credibility of any individual. However, we do have certain facts at our disposal which we believe to be true. We have certain facts at our disposal that Mr. Hasenstab has admitted in connection with the filing of his income tax returns.

Those tax returns, which we have offered into evidence in connection with the sentencing, as the Court knows, reflect the receipts of payments of suppliers to Pan American other than George Barney's company. Mr. Hasenstab fastly refuses to discuss those people with the Government.

THE COURT: As a matter of fact, I have before me a Form 1099 made out by a company, with the recipient being Mr. Hasenstab, indicating in 1973 Mr. Hasenstab received $6,000.

What I do not know from this, but you have supplied that link, is that the payor, that is, the firm making out the Form 1099, was a supplier of Pan American.

MR. KINGHAM: That is correct, your Honor.

THE COURT: I noted, although I don't believe there are any other Forms 1099 attached to the papers you gave me, that there are in the body of returns for subsequent years indications of other income received in commission form from companies.

The 1975 individual income tax return of the defendant and his wife indicates a commission in the amount of $3,500.

The 1974 income tax return of the defendant and his wife indicates commissions from two sources in excess of $10,000.

I did not know from looking at the returns themselves, or even at the 1099, that these sources were suppliers.

Is it your representation that in each case the sources were at that time suppliers to Pan American?

MR. KINGHAM: That is correct, your Honor, with the exception of one which I have indicated in the letter was related to a supplier in the sense that it was a corporate vehicle for making payments from a supplier but was not in fact a supplier, as we understand it.

The point we make with respect to those returns is twofold. First of all, because Mr. Hasenstab, even though he knows and we have represented that we will not use the information against him, Mr. Hasenstab steadfastly refuses to discuss those payments. Those payments obviously are of a tremendous interest to the Government in trying to root out corruption of Pan American and elsewhere that may have been committed by these suppliers.

THE COURT: Yes. I suppose the theory being if you corrupt in one respect it is likely that you would corrupt in others.

That is your point, I guess.

MR. KINGHAM: It is. I think George Barney is a prime example.

THE COURT: Yes. It would appear so.

MR. KINGHAM: That basically is the problem that the Government has with Mr. Hasenstab's proffered cooperation.

Secondly, with respect to the income tax returns, as we have pointed out in the letter, your Honor, the income tax returns do reflect a sizable amount of cash available to the defendant, and he didn't report any of the money he got from Mr. Barney.

So much for the tax returns, and I think for our letter which the Government believes speaks for itself.

Your Honor, with respect to Mr. Hasenstab as an individual, we think it appropriate to point out to this Court that this was not a crime that was committed by a man in desperate circumstances. This was not indeed a crime committed by a man who had to put bread on his table or a roof over his head. It was committed by a tremendous sense of greed.

That is a difficult motive, I am sure, for the Court in assessing an appropriate sentence.

As the Court knows, our office takes no position with respect to sentence as far as a recommendation is concerned. I think that we do have a significant interest in deterring this type of crime, and the U. S. Attorney's office in this district is committed to enforcing the laws that relate to commercial bribery particularly.

We have brought, as your Honor knows, several cases recently, the Corey case being one, the Hasenstab case, and I suggest from Mr. Barney's testimony the Court can see there may well be others that will be brought.

Frankly, we hoped that Mr. Hasenstab might have been able to help us in that effort. Unfortunately, commercial bribery is viewed by some, cynically perhaps, as being a way of live in the American corporate scene. We believe that it shouldn't be. We believe that whatever this sentence gives, custodial, noncustodial, fine or not, or probation or whatever, that it will be and should be a sentence that will point out,not only to Mr. Hasenstab but to the business community and to the consumers who pay the ultimate price here, that commercial bribery is treated seriously by the Government and by the Courts in this district, and that whatever Mr. Hasenstab's punishment is that that punishment will have a sufficient deterring effect on this type of conduct.

I have nothing further, your Honor.

THE COURT: Thank you, Mr. Kingham.

The Court is prepared to impose sentence.

I have before me a defendant, a 40-year-old defendant, married, with children, who is before this Court for sentencing after having been found guilty on a three-count indictment charging him with mail fraud, wire fraud and conspiracy in connection with his receiving substantial illegal cash payments from 1968 to 1976 while he was serving as a purchasing department supervisor for Pan American Airways.

The thrust of the Government's case was that the defendant directed a large portion of his company's business in a particular area where he was responsible for purchasing to a particular stock form company. In exchange for directing business to that company, he received and kept substantial cash payments.

In this Court's view, the underlying facts were clear, supported by wire recordings which the Court heard. It is clear that the monies were paid and, from the chart and evidence presented to the Court and jury, the increase in purchases over a period of time appeared to be parallel to the increase in payments which continued over a period of time.

The defendant, so far as this Court is aware, has no prior record of criminal misconduct. Unlike others who blame drugs or alcohol, other than possibly imbibing moderately, the defendant clearly has not abused drugs or alcohol. He has worked steadily and had achieved a responsible position with Pan American. A great deal of this is to his credit.

He was the product, as I understand it, of a broken home without the benefit of guidance from his father during his formative years and his period of adolescence.

He is the oldest of three children in a fatherless household. He assumed many responsibilities at an early age and appeared to have been on the way to being a successful member of society and successful in the business community and in the community where he lived.

He appears to be a normal person in all mental, physical respects, and has been active in his community in such activities as auxiliary policy work. This is something that came through in a number of the materials which were placed before me.

He was employed by Pan American for over twenty years and approximately nine years ago rose to a management level, which I would consider to have been an accomplishment in such a competitive company. He has terminated his employment with Pan American, having resigned following his arrest in the instant case.

As counsel has indicated, he would appear at this stage to have no promising job prospects.

As I have indicated, he is married and has children, two in number. He appears to be a family-oriented individual who has spent a great deal of his time and effort in building an environment for his own family, something I imagine he wishes that he had had as a younger person.

I mentioned his voluntary work as an auxiliary policeman, and I must say that up until this point everything that I have said about the defendant, aside from his activities here, would appear to be of a positive nature.

However, there is another side to this matter. It is the crime iteself. It is not a matter of impulse but a matter of greed, demonstrated disloyalty to an employer of many years. It is no excuse that others in the company may have engaged in these practices. They were wrong and a person, it seems to me, who believes in the ethics of hard work and honesty should have rejected them, no matter who in his company or other companies was engaging in such activities.

Up to this point in time, it would appear that the defendant had been demanding of himself and expected the same of others. He succumbed here and, in my judgment, to greed, apprently not in connection with but one instance, but apparently in connection with several.

The sentence here will only deal with the instances which are the subject of this indictment. I will not sentence the defendant in connection with any other matters, including any tax matters.

I have a case here involving mail fraud, wire fraud and conspiracy to do so. The sentence will be directed to that and to nothing else.

A sentence must, in this Court's view, be imposed. I recognize that many say sentencing persons convicted of white collar crimes really doesn't deter anybody. I happen to believe that if it helps a little bit as a general deterrent -- and, of course, also in this case it would be a special deterrent -- it serves a purpose.

Sentencing is not a pleasant function. Sentencing is a most difficult function.

In view of the nature of the offense here, the substantial amount of monies involved, and the fact that this occurred over a period of time, was engaged in by a man who had no pressing economic need, who was not addicted to drugs or alcohol or even to gambling, there is just no excuse for the conduct which was engaged in here by the defendant. The Court has concluded that a period of confinement is required.

The Congress has indicated that this Court may impose a sentence of five years on each of the three counts of this indictment. Thus, the defendant faces the possibility of spending a good portion of time in a federal prison. I have tried to view and weigh this case with the view in mind to understandings of the problems of the community, which are substantial, and the problems of the defendant and his family.

I am mindful of his role as a husband and as a father. At the same time this is the day when judgment must be pronounced and it will be.

This is the sentence of the Court:

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of six months on count 1 of the indictment. Imposition of sentence on count 2 of the indictment is hereby suspended, and the defendant placed on probation for a period of two years, such period of probation to be consecutive to the term of imprisonment imposed on count 1. It is to be subject to the standing probation order of this Court.

It is adjudged that on count 3 the defendant pay a fine to the United States in the sum of $7,500. The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law.

That is the sentence of the Court.

MR. FRIEDMAN: If your Honor please, the defendant has indicated to me that he contemplates the taking of appeal on the question of law raised by counsel during the course of this trial. He hasn't firmly committed himself to that cause of action.

I would ask your Honor to suspend the surrender date for a few days until he makes that determination and fix bail in the event the defendant files a notice of appeal from this conviction and the judgment rendered thereof.

MR. KINGHAM: Your Honor, with respect to the surrender date, we have no objection to setting a surrender date by this Court sometime in the very near future.

We do object to bail pending appeal.

THE COURT: In view of the comments by the U. S. Attorney, I will excuse you, Mr. Marshal.

MR. KINGHAM: We object to bail pending appeal. We think that any appeal in this case would indeed be viewed by the Court of Appeals as frivolous.

With that in mind and a likelihood of total lack of success on appeal, we feel that there should be no bail pending appeal here.

THE COURT: I would suggest that the matter could be handled, since you indicate you have no objection to the defendant having a reasonable period to surrender, if we put the surrender date over something in the neighborhood of ten days to two weeks.

Within that period of time, counsel would know whether or not he will take an appeal and then, it seems to me, you could come back here, and if counsel has at that point indicated his client intends to take an appeal, he could seek bail pending appeal, and I would listen to both sides.

If at that time he determines not to proceed with the appeal, his client would surrender and begin serving his six-month period of confinement.

My thought, to be consistent here with the application made by both sides, would be to adjourn the surrender for something in the neighborhood of ten days to two weeks.

Let me first hear from Mr. Friedman on that and then from you.

Why don't you take a moment to consult with Mr. Hasenstab? His personal and family convenience obviously are something that are on his mind and, I am sure, on his wife's.

MR. FRIEDMAN: We have discussed the matter, Judge, and if your Honor would set ten days or two weeks at the most, we think it would be very gracious of the Court. Perhaps the 18th or some day before, if that would be the preference of the Court, Mr. Hasenstab will make his final determination as to what will be done here and straighten out his family affairs.

THE COURT: Mr. Kingham, that does not appear to the Court to be an unreasonable request.

MR. KINGHAM: We have no objection to surrender in Part I at 9:30 on the 18th.

THE COURT: I am supposed to be at a sentencing institute at Morgantown, West Virginia. It may be that someone may want to make an application. It might be better if we set the surrender down for perhaps Thursday, the 20th.

MR. KINGHAM: That is fine, your Honor.

THE COURT: In Part I.

MR. FRIEDMAN: I have no objection.

The only question is this application for bail. I think your Honor is perhaps conversant with the facts in the case and it would seem to be the wrong thing to ask a judge in Part I.

THE COURT: That is why I put it over from Tuesday. On Monday and Tuesday I am supposed to be at the Kenney Correctional Institution in Morgantown, West Virginia. I expect to be back on Wednesday. I was thinking on Thursday, in case it was necessary for you, either on Wednesday or Thursday, to make some sort of an application.

MR. FRIEDMAN: All right, Judge. That is agreeable.

THE COURT: What I will do is this. My recollection is the defendant was released by me on his own recognizance at the time of the jury's verdict.

MR. KINGHAM: That is correct.

THE COURT: If the Government has no objection, I would set down the surrender for October 20 and continue the defendant on his own recognizance with the same bail limits. He has appeared on every occasion. He knows now, in view of the sentence which has been imposed and which has certain limits, that it would be a grave mistake to do anything to exacerbate that situation.

MR. KINGHAM: I have no objection to continuing the bail.

THE COURT: This is what we will do to cover all the matters:

Number one, the defendant's surrender is adjourned and the defendant is directed to surrender on Thursday, October 20, 1977, at 10:30 a.m. in Courtroom 506.

The defendant is continued on his own recognizance, same bail limits, the continental United States, and is directed to surrender on the date and time in question.

He is advised now by the Court that, in the event he fails or refuses to surrender on the date and time and place in question, without there being a Court order to the contrary which would supersede what I am saying now, then he subjects himself to further additional penalties which he neither wants nor needs.

The only thing I think I should do is suspend or stay the order that the defendant stands committed with regard to the fine. What I will do there is that I will stay the portion of the judgment that the defendant stands committed with respect to the fine until the same date and time of the surrender, which would be October 20 at 10:30 a.m. I will hold up on surrender and, to be consistent, I will hold up on payment of the fine by staying the commitment on that until Thursday, October 20, 1977 at 9:30.

MR. FRIEDMAN: Would be at liberty to make application to you at that date or a prior date with reference to bail?

THE COURT: I would be available on the 19th. That is why I indicated that, and also on the 20th. I would not be available on the 17th or 18th because I will be out of the district for this sentencing institution.

MR. FRIEDMAN: Thank you very much.

MR. KINGHAM: Nothing further, your Honor.

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FRIEDMAN

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 9 day of Dec. ,19 77 at No. 1 St. Andrews Pl., NY

deponent servied the within Appendix
upon
Hon. U.S. Atty., So. Dist. of NY

the Appellee herein, by delivering 1 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
9 day of Dec. 1977

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978